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In The
Supreme Court of the United States

STATE OF LOUISIANA, through the
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,

Petitioner,

vs.

ALBERT ROUYEA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

CHARLES C. FOTI, JR.
Attorney General of the State of Louisiana
By
STACEY MOAK
Special Assistant Attorney General
Counsel of Record
DAVID E. COOLEY, JR.
P.O. Box 77651
Baton Rouge, Louisiana 70879-7651
Telephone (225) 751-6300
Facsimile (225) 751-6301

JOHN CLAIBORNE YOUNG
Chief Counsel,
Louisiana State Office of Risk Management
P.O. Box 91106
Baton Rouge, Louisiana 70821-9106
Telephone (225) 219-0184
Facsimile (225) 342-8473

Attorneys for Petitioner the State of Louisiana, through the Department of Transportation and Development

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1) May a state court ignore the federal legislative prohibition embodied in 23 U.S.C. § 409, regarding the discovery of, admission as evidence, or consideration for other purposes of data compiled pursuant to the purposes of the Highway Safety Act, set forth in 23 U.S.C. § 130, 144, and 152, by allowing the plaintiff to introduce into evidence the Department of Transportations and Development's "Highway Needs and Priorities" information?

2) Is information compiled pursuant to the purposes of the Highway Safety Act, but before the passage of 23 U.S.C. § 409, subject to the federal statutory prohibition regarding its discovery, admission as evidence, or consideration for other purposes in any action for damages?

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STATEMENT OF BASIS FOR SUPREME COURT JURISDICTION

On November 4, 2005, the Louisiana Court of Appeal for the First Circuit rendered its opinion (App. 1).

On December 9, 2005, DOTD timely filed an application for a writ of certiorari and/or review with the Louisiana Supreme Court (App. 22), the court of last resort in the state. On April 17, 2006, the Louisiana Supreme Court entered an order denying the writ application and refused to exercise its supervisory jurisdiction. (App. 15).

The present petition is timely filed under 28 U.S.C. § 2101 and under Rule 13.1 of this Court. This Court has jurisdiction under 28 U.S.C. § 1257 and under Rule 10(b) and (c) of this Court.

RULE 10 CONSIDERATIONS AND 28 U.S.C. § 1257

28 U.S.C. § 1257(a) provides that:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty

> or statute of United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Louisiana Supreme Court, the highest court in the state, refused to grant a writ to review a trial judge's decision, which was upheld by an intermediate appellate court, and denied the State of Louisiana, through its Department of Transportation and Development ("DOTD"), a defendant in this personal injury accident, the benefit of a federal statute that barred the discovery and use at trial of certain evidence that the state compiled and published pursuant to a federal highway safety program. This evidence was an important factor (as stated by the trial court) in the adverse judgment rendered against DOTD.

This Honorable Court's Rule 10 sets out considerations governing review on certiorari. Rule 10(c) is applicable to the case *sub judice* in that the Louisiana Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, i.e., *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003).

In *U.S. ex rel. Herge v. Com. of Pa.*, 89 F.Supp. 636 (D.C. Pa. 1950), the court stated that:

> "It is a well-established principle that before the Supreme Court will review a decision of a state

> court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, the Supreme Court of the United States will not undertake to review the state decision. It is likewise well settled that if the independent ground were not a substantial or a sufficient one, it will be presumed that the state court based its judgment on the law raising the federal question, and the Supreme Court will then take jurisdiction. *Williams v. Kaiser*, 323 U.S. 471, 477, 65 S.Ct. 363, 89 L.Ed. 398."

From the beginning of this case, DOTD raised the issue, and asserted that the protection of 23 U.S.C. § 409 should be applied to the "Highway Needs and Priorities"[1] publication, which was introduced into evidence over the strenuous objections of DOTD's counsel. Nevertheless, the trial court admitted the publication into evidence and relied upon it for its decision. DOTD cited this action as an error by the trial court and addressed it in both an appeal to the Louisiana Court of Appeal, First Circuit, and a writ application to the Louisiana Supreme Court, to no avail. This issue is one of importance in the administration of the Federal Hazard Elimination Program and, if allowed to stand, may frustrate the implementation of that program.

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[1] Plaintiff's Exhibit P-31. Document was admitted over objection of defense counsel on the grounds that is was protected by 23 U.S.C § 409 (Tr. p. 709 and 727).

Not only have the courts of the state of Louisiana ignored the recent ruling of this court in *Gullien, supra*, but they have ignored the Louisiana Supreme Court's decision in *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170, 173 (La.1993), wherein the court, although taking an overly narrow view of the protections of 23 U.S.C. § 409[2] nevertheless was correct when it held at page 173 that:

> To recapitulate, the following are discoverable and admissible:
>
> * * *
>
> The following are not:
>
> (1) surveys to identify hazardous railroad crossings and improve them (§ 130);
>
> (2) applications for federal assistance in replacing or rehabilitating highway bridges (§ 144);
>
> (3) studies assigning priorities and schedules of projects for highway improvement (§ 152); and,

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[2] In ***Gullien***, *supra*, Justice Thomas explained that the proper scope of § 409 engendered a great deal of confusion among circuit and state courts:

> "Some state courts, for example, concluded that § 409 addressed only the admissibility of relevant documents at trial and did not apply to pretrial discovery. According to these courts, although information compiled for § 152 purposes would be inadmissible at trial, it nevertheless remained subject to discovery . . . Other state courts reasoned that § 409 protected only materials actually generated by a governmental agency for § 152 purposes, and documents collected by that agency to prepare its § 152 funding application remained both admissible and discoverable. See e.g. *Wiedeman v. Dixie Elec.*"

> (4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§ 409).

The "Highway Needs and Priorities" publication at issue falls squarely under no. 3 in the *Wiedemen* holding. And yet, without explanation, the Louisiana courts ignored this edict in the case *sub judice*. (See also, *Long v. State ex rel. Dept. of Transp. and Development*, 2004-0485 (La. 6/29/05); 916 So.2d 87, below, where the Louisiana Supreme Court correctly applied § 409.)

At the trial of this case, when the admissibility of this evidence was being argued, the trial court asked if 23 U.S.C. § 409 was in effect in 1983. When the court learned that it was not, it stated, at page 276 of the trial transcript: "If 409 was in effect in '83 I'm not going to allow it (speaking of "Highway Needs and Priorities") in. If it was not in effect then I'm going to allow it."

In so doing, the court ignored decisions from the courts of two sister states, Ohio and Missouri. In *Perkins v. Ohio Dept. of Transp.*, Ohio App. 10 Dist.1989, 584 N.E.2d 794, 65 Ohio App.3d 487, *cause dismissed*, 566 N.E.2d 673, 57 Ohio St.3d 612, *rehearing denied*, 570 N.E.2d 281, 58 Ohio St.3d 711, the court found that § 409 applied retroactively to an action against the Department of Transportation arising from an intersectional automobile collision. The court wrote that no "manifest injustice" would result from retrospective application of this statute, as, while plaintiffs would not be permitted to introduce certain evidence at trial, they were not deprived of their cause of action against DOT. Similarly, in *Claspill v.*

Missouri Pacific R. Co., 793 S.W.2d 139 (Mo. 1990), *certiorari denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990), that court found that § 409 applied retroactively to various reports and surveys identifying or evaluating highway safety problems for purposes of allocating funds created prior to the effective date of that statute.

The Louisiana courts have thus thwarted the purposes of the Federal Hazard Elimination Program by allowing plaintiffs to use information compiled pursuant to federal statute and pertinent regulations, and protected by statute and both federal and state court decisions. Such behavior should not be allowed to stand. Therefore, DOTD asks this Honorable Court to issue a per curiam order granting a new trial to DOTD and prohibiting the introduction into evidence of any information regarding highway safety prepared under the provisions of the Federal Hazard Elimination Program, more particularly, the "Highway Needs and Priorities" publication.

FACTS IN THIS CASE

At 7:15 a.m. on September 24, 1987, James Tompkins ("Tompkins") was traveling westbound on Louisiana Highway 429, Cornerview Road, in Ascension Parish. Keith Rouyea ("Rouyea") and James Gandolfi ("Gandolfi") were passengers in his 1977 Ford LTD. Tompkins had been up for seventeen hours prior to the accident and had been drinking. As Tompkins approached the subject curve, he passed a 45 m.p.h. speed limit sign and a curve warning sign. Despite these warnings, Tompkins was traveling approximately 63 m.p.h. as he approached the

curve. Due to his intoxication, fatigue, and speed, Tompkins had a substantially delayed steering input which caused him to run off the right side of the road before the curve began.

After Tompkins left the road, he traveled approximately 110 feet according to the investigating officer, State Trooper Robert Landry, before striking a tree which was located eleven feet, seven inches from the inside of the white shoulder line of the road. Trooper Landry saw no evidence of braking by Tompkins.

Tompkins woke up at 1:00 p.m. on September 23, 1987, the day before the accident. Before leaving his house, he drank two or three beers at about 4:00 or 5:00 p.m. Tompkins drove to a Burger King and met up with Gandolfi at about 6:00 or 7:00 p.m. Gandolfi had a six pack of beer with him.

After meeting, the pair went to Baton Rouge, where they drove around the Baton Rouge area for about two or three hours. After leaving Baton Rouge, they drove to St. Amant, and picked up Rouyea at his home, sometime after midnight. After leaving Rouyea's house, Tompkins drove to his parents home, and then on to Gandolfi's home. On the way to Gandolfi's home, the above described accident occurred.

Trooper Landry testified that he smelled alcohol on the driver following the accident and had a blood test done on Tompkins at the hospital, which turned up positive for alcohol at 0.08%, two hours after the accident. Gary Wimbish, Ph.D., DOTD's expert toxicologist, testified that Tompkins' blood alcohol level was approximately .11% at the time of the accident, and that a combination of intoxication and fatigue caused him to have a delayed steering input which caused the accident.

As result of the accident Tompkins suffered minor injuries, Rouyea suffered severe injuries rendering him a quadriplegic, and Gandolfi suffered mortal injuries.

A bench trial was held before the Honorable Thomas J. Kleibert, Jr., on October 6, 2003, and continued on October 7, 16, and on November 7, 2003. After evidence was taken, the matter was taken under advisement and the plaintiff and DOTD were instructed to file post-trial memorandums. Following the submission of the parties' post-trial briefs, on June 16, 2004, the trial court rendered written reason for judgment.

The trial court found that Tompkins was at fault in the cause of the accident and that Louisiana Highway 429 at the site of the accident created an unreasonable risk of harm and was a cause of the accident and that DOTD should have placed guardrails in front of the trees in the curve which Tompkins struck. The court allocated 85% of the fault to James Tompkins and 15% of the fault to DOTD.[3]

The court awarded the following damages: Past medical expenses including gratuitously rendered medical care $901,035.80; future medical expenses $5,751,905.00; past lost earnings $367,809.00; future lost earnings $503,617.00; physical pain and suffering $750,000.00; mental anguish $500,000.00; loss of enjoyment of life $500,000.00; loss of consortium for Albert Rouyea $150,000.00; and loss of consortium for Beverly Rouyea $150,000.00. The total award for all plaintiffs is $9,574,366.

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[3] Under the Louisiana Civil Code as it existed at the time of the accident, if DOTD is found partially responsible for the accident, they are held liable for 50% of the damages.

DOTD filed a timely appeal with the Court of Appeal and assigned as error the trial court's evidentiary ruling allowing into evidence a DOTD report entitled "Highway Needs and Priorities", and relying upon the report in rendering judgment in favor of the plaintiffs. This report was compiled pursuant to 23 U.S.C. § 152 which created a national Hazard Elimination Program to enhance highway safety and, as such, is inadmissible in evidence as declared in 23 U.S.C. § 409. Such an error of law interdicted the fact-finding process and required a de novo review of the record by the appellate court.

On November 4, 2005, the Court of Appeal rendered its opinion affirming the trial court's evidentiary ruling and judgment in favor of the plaintiffs. In its reasons for judgment, the Court of Appeal did not address DOTD's argument that the trial court erred in allowing the Highway Needs and Priorities Manual into evidence. Rather, the Court of Appeal merely commented on the issue in a footnote stating, "We also find no error of law in the trial court's admission of and reliance on plaintiff's exhibit P-31. The evidence was not subject to the shield of 23 U.S.C. § 409." The Court of Appeal's decision not to address the inadmissibility of evidence pursuant to § 409 demonstrates a failure to give full faith and credit to the legislative acts of the United States Congress, and frustrates the purpose of the federal legislation concerning the Highway Safety Program.

On December 9, 2005, DOTD filed a writ application with the Louisiana Supreme Court. DOTD assigned as error the Court of Appeal's ruling on the admissibility of the Highway Needs and Priorities Manual, pursuant to 23 U.S.C. § 409. On April 17, 2006, the Louisiana Supreme Court denied DOTD's writ application without comment. The Louisiana Supreme Court's failure to address the

admissibility of evidence pursuant to § 409 further demonstrates the Louisiana judiciary's failure to give full faith and credit to the acts of both the U.S. and Louisiana legislative and executive bodies.

ARGUMENT ON ASSIGNMENT OF ERROR

Plaintiffs in this case presented evidence in the form of a document prepared by defendant, DOTD, entitled "Highway Needs and Priorities." This document was prepared by the state pursuant to the federal Hazard Elimination Program ("Program") that provides state and local governments with funding to improve the most dangerous sections of their roads. Although this Honorable Court addressed the application of 23 U.S.C. § 409 in *Pierce County, supra,* not long ago, a brief history of this Program is presented here for ease of reference.

In 1958, Congress declared that it was in the national interest to develop a nationwide highway system to be financed through Federal aid (see 23 U.S.C. § 101[b]). In furtherance of this objective, Congress, in 1966, adopted the Highway Safety Act. The purpose of this Act was to improve highway safety by encouraging closer federal and state cooperation with respect to road improvement. Towards this end, Congress, in 1973, adopted the Highway Hazard Elimination Program. Under the Program, each state was required to systematically prepare and maintain an engineering survey of all public roads. The purpose of the survey was to identify roadside hazards and hazardous conditions, to assign priorities for the correction of hazards, and to establish and to implement a schedule of projects for their improvement.

The Secretary of the Department of Transportation informed Congress in 1976 that he was having great difficulty receiving data from the states under this Program.[4] The Secretary advised Congress that some "states are very concerned" and "expressed strong objection" to the absence of any confidentiality for their compliance efforts "because of legal actions resulting from accidents at these locations before an improvement can be made."[5] States refused to comply with the information gathering and resisted applying the process "uniformly . . . to all public roads," not using "current, reliable accident data . . . to help identify hazardous locations" or performing "adequate evaluations."[6] According to the Secretary, states' "highway departments were reluctant to compile information to identify and prioritize roadway hazards for fear that acknowledging the existence of hazardous conditions would expose them to liability."[7]

In 1984, Congress added Section (k) to 23 U.S.C. § 402, which conditioned a state's eligibility for highway safety funds under that statute on whether the state either "certifies to the Secretary that it has in operation a

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[4] Kara M. Turner, "The Great Train Robbery that Wasn't: Practical Implications of *CSX v. Easterwood*," 72 Wash. U.L.Q. 1449, 1456 (1994), citing Fed. Highway Admin., U.S. Dep't of Transportation, Railroad-Highway Grade Crossing Handbook, 5 tbl. 5 (1992).

[5] United States Department of Transportation and Development, Secretary's Second Annual Report on Highway Safety Improvement Programs (1976).

[6] United States Department of Transportation and Development, Secretary's Annual Report on Highway Safety Improvement Programs (1986).

[7] Id.

computerized traffic safety record keeping system" or "provides . . . a plan . . . for establishing and maintaining a computerized traffic safety record keeping system." Section (k) further provided:

> Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

However, since § 402 only protected raw data such as a "report, list, schedule, or survey . . . prepared by a state," Congress enacted 23 U.S.C. § 409 in 1987. Section 409 extended the same protection of former § 402 to all "reports, surveys, schedules, lists, or data compiled . . . for the purpose of . . . Sections 130, 144 and 152 of this title 'as well as to' any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds." In 1995, Congress amended § 409 to include the words "or collected" after "compiled," as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152[8] of the title or

[8] In 2005, Pub.L. 109-59, § 1401(a)(3)(C) struck out "152" and inserted "148," but since the trial of this case began in October, 2003, the 1995 version applies.

> for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.[9]

(As amended Nov. 28, 1995, P.L. 104-59, Title III, § 323, 109 Stat. 591).

This clarification was added in response to inconsistent application of § 409 in state court decisions that, in the view of Congress, misinterpreted the term "data compiled" to apply only to raw data itself and which failed to look at the purpose for which the data was compiled.

Congress' intent in adopting the 1995 amendment to § 409 was articulated as follows:

> It is intended that raw data compiled prior to being made part of any formal or bound report

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[9] 23 U.S.C. § 130(d) requires, inter alia, that states participating in funding thereunder survey highways to identify railroad crossings which "require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose."

23 U.S.C. § 144(b), similarly, requires, inter alia, an inventory of all highway bridges "on any Federal-aid system . . . [and] assign each a priority for replacement or rehabilitation. . . ."

23 U.S.C. § 152(a) requires that participating states survey "all public roads to identify hazardous locations . . . assign priorities for the correction of such locations . . . and implement a schedule of projects for their improvement." Louisiana's "Highway Needs and Priorities" information was prepared pursuant to this section.

> shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.[10]

Thus, Congress made clear that § 409 restricts the admissibility of information compiled for purposes of the Program set forth in 23 U.S.C. §§ 130, 144 and 152, which could be used against states in civil litigation. Courts have recognized that Congress' purpose in enacting the statute was to facilitate candor in administrative evaluations of highway safety hazards and to prohibit federally required record-keeping from being used as a tool in private litigation. Such candor assists state transportation departments and the Federal Highway Administration in accurately identifying roadway hazards and developing plans to eliminate them through federal-aid programs in which the federal government assumes 90% of the cost.

The Program provides state and local governments with funding to improve the most dangerous sections of their roads. To be eligible for funds under the Program, a state or local government must undertake a thorough evaluation of its public roads. Specifically, 23 U.S.C. § 152(a)(1) requires them to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and

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[10] National Highway System Designation Act of 1995, Pub.L. No. 104-246, § 328 reprinted in 1995 U.S.C.C.A.N. 109 Stat. at 651.

pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement." The Secretary of Transportation has promulgated regulations implementing the Program, including, 23 C.F.R. § 924.1, et seq., which addresses the policy,[11] planning,[12]

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[11] 23 C.F.R. § 924.5 Policy.

Each State shall develop and implement, on a continuing basis, a highway safety improvement program which has the overall objective of reducing the number and severity of accidents and decreasing the potential for accidents on all highways.

[12] 23 C.F.R. § 924.9 Planning.

(a) The planning component of the highway safety improvement program shall incorporate:

(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential;

(3) A process for conducting engineering studies of hazardous locations, sections, and elements to develop highway safety improvement projects as defined in 23 U.S.C. 101(a); and

(4) A process for establishing priorities for implementing highway safety improvement, projects, considering:

(i) The potential reduction in the number and/or severity of accidents,

(ii) The cost of the projects and the resources available,

* * *

(vi) Other criteria as appropriate in each State.

* * *

implementation[13] and evaluation[14] of highway safety improvements.

By its express reference to §§ 130, 144, and 152 of Title 23, § 409 must be construed *in pari materia*. The documents protected under § 409 necessarily include those indicated in § 152. There is no doubt that the publication,

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[13] 23 C.F.R. § 924.11 Implementation.

(a) The implementation component of the highway safety improvement program in each State shall include a process for scheduling and implementing safety improvement projects in accordance with (1) the procedures set forth in 23 C.F.R. Part 630, Subpart A (Federal-Aid Program Approval and Project Authorization) and (2) the priorities developed in accordance with § 924.9. The States are encouraged to utilize the timesaving procedures incorporated in FHWA directives for the minor type of work normal to highway safety improvement projects.

(b) Funds apportioned under 23 U.S.C. 152, Hazard Elimination Program, are to be used to implement highway safety improvement projects on any public road other than Interstate.

* * *

[14] 23 C.F.R. § 924.13 Evaluation.

(a) The evaluation component of the highway safety improvement program in each State shall include a process for determining the effect that highway safety improvement projects have in reducing the number and severity of accidents and potential accidents, including:

(1) The cost of, and the safety benefits derived from the various means and methods used to mitigate or eliminate hazards,

(2) A record of accident experience before and after the implementation of a highway safety improvement, project, and

(3) A comparison of accident numbers, rates, and severity observed after the implementation of a highway safety improvement project with the accident numbers, rates, and severity expected if the improvement had not been made.

(b) The findings resulting from the evaluation process shall be incorporated as basic source data in the planning process outlined in § 924.9(a).

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"Highway Needs and Priorities," admitted into evidence by the trial court, contains information compiled for safety purposes pursuant to § 152. The plaintiffs' expert witness, Mr. James Clary, has admitted as much in testimony in another case:

> "According to Mr. Clary, a minimum tolerable condition is separate from the design standards promulgated by AASHTO. Mr. Clary testified that DOTD uses the minimum tolerable condition approach as a guide in grading the highway system and determining which roads to place in the construction program. Mr. Clary further testified that DOTD used safety research performed by AASHTO and various research committees in determining what the minimum tolerable conditions should be."

Thornhill v. State Dept. of Transp. and Development, 676 So.2d 799, page 806, 95 1946 (La.App. 1 Cir. 6/28/96), *writ denied by, Riley v. State Through Dept. of Transp. and Development*, 96-2014, 683 So.2d 272 (La. 11/8/96), and *writ denied by, Riley v. State Through Dept. of Transp. and Development*, 96-2021, 683 So.2d 272 (La. 11/8/96).

The trial judge in the case *sub judice* allowed the introduction of the "Highway Needs and Priorities" document and testimony regarding its contents. It appears that his reasoning for doing so was based on the fact that this document is dated in 1983 and Congress did not create § 409 until 1987. (See page 5 above.)

The United States Supreme Court recently had occasion to address the application of 23 U.S.C. § 409 to § 152 information in the case of *Pierce County v. Guillen, supra*, 123 S.Ct. at 730. The Court held:

> The interpretation proposed by the Government, however, suffers neither of these faults. It gives effect to the 1995 amendment by making clear that § 409 protects not just the information an agency generates, i.e., compiles, for § 152 purposes, but also any information that an agency collects from other sources for § 152 purposes. And, it also takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation.

The Louisiana Supreme Court recently discussed the *Guillen* decision in *Long v. State ex rel. Dept. of Transp. and Development, supra.*

The case dealt with the admissibility of letters from the mayor of the town of Bonita to DOTD regarding two accidents at a railroad crossing in the previous eight years, DOTD's response that it planned to signalize the railroad crossing from funds available through a federal safety program and the mayor's response, agreeing to the terms set forth in DOTD's letter. DOTD objected, arguing that the letters were protected by 23 U.S.C. § 409. The court wrote:

> We find the reasoning of Guillen and our language in Reichert and Palacios particularly instructive to our inquiry in this case, and therefore consider that instruction in our analysis of the letters introduced by the plaintiffs. In particular, we must keep in mind Congress' goal in enacting § 409, i.e. fostering candor and diligence in information gathering. States must be allowed to compile information without hesitation and fear that information collected may be used against them in private litigation.

> . . . The letters evidence the commencement of the process in selecting the roadway/railway crossing for improvement and can be compared to the letter in Guillen which was originally prepared and maintained by the county sheriff. In fact, the letters herein bear a strong resemblance to the letters held inadmissible in Reichert.
>
> . . . Hence, we find these three letters represent information necessary for the commencement of the upgrade for this roadway/railroad crossing, and thus, the letters effectuate the purpose of the federal safety program. Taken as a whole, and in the context of the framework of the purpose of § 409, we find the letters were compiled and collected by the DOTD for purposes related to funding through § 130, a federal safety program. Thus, we find the letters are protected from discovery and are inadmissible under 23 U.S.C. § 409.

DOTD's "Highway Needs and Priorities" publication, wrongly admitted into evidence by the trial court and considered in its opinion, was compiled and collected by DOTD for purposes related to § 152, another federal safety program. As such, it, too, is protected and inadmissible under 23 U.S.C. § 409.

In *Vega v. State*, 10 Misc.3d 822, 804 N.Y.S.2d 229, 2005 WL 3070794 (N.Y. Ct. Cl., Oct. 13, 2005), claimants alleged that they were injured in an automobile accident which occurred as the result of negligence by the New York State Department of Transportation in failing to rectify a "dangerous intersection" for an unreasonable period of time. The State raised objections to any and all material, testimony and documentary evidence concerning the DOT internal classification of the intersection as a "dangerous intersection." The basis for this objection was 23 U.S.C.

§ 409, "which creates certain evidentiary protections for states which collect or compile data on highway safety for the purposes of obtaining funding under Section 152 of the federal Hazard Elimination Program." (Page 1.) The court cited *Guillen* and held, at page 2:

> . . . , Section 409 was amended in 1991 and 1995, both times with the obvious congressional intent of strengthening the protections afforded to the states in gathering and compiling information regarding highway safety for purposes of federal funding under Section 152. Although Section 409, as amended, will certainly result in somewhat harsh results for an individual claimant, Congress has made clear that the public policy of encouraging candid study, design and construction of highway safety improvements is paramount. This is a determination correctly left to the legislature and should not be disturbed by the Courts.

Before *Guillen*, an Alaska court found in *Walden v. Department of Transp.*, 27 P.3d 297 (Ak. 2001),[15] that a Design Study Report prepared by its State Department of Transportation was made for the purpose of planning safety enhancements for or developing a federally funded highway safety construction improvement project was protected by § 409. Louisiana's "Highways Needs and Priorities" is a similar publication in that it is an essential

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[15] It is interesting to note that in both *Vega* and *Walden* the plaintiffs obtained the contested information in discovery but were not allowed to use it at trial. Both cases found that both DOTs waived only the protection of the statute with respect to discovery, not to its admission in court. Because both DOTs timely objected to use of the information at trial, it is clear that they did not waive the protection of the federal statute with respect to admissibility of the information at trial.

step in identifying state roadways that need upgrading for safety purposes.

The trial court erred in allowing the "Highway Needs and Priorities" report and testimony concerning information compiled by DOTD under the Program. The appellate court compounded the error when it found no error of law by the trial court in this respect. The consideration of this protected evidence by the trial court was prejudicial to DOTD and materially affected the outcome of this case. For this reason, this court should remand the case to the trial court and order a re-trial which conforms to the protections provided states in 23 U.S.C. § 409.

Respectfully submitted,

CHARLES C. FOTI, JR.
Attorney General of the State of Louisiana
By
STACEY MOAK
Special Assistant Attorney General
Counsel of Record
DAVID E. COOLEY, JR.
P.O. Box 77651
Baton Rouge, Louisiana 70879-7651
Telephone (225) 751-6300
Facsimile (225) 751-6301

JOHN CLAIBORNE YOUNG
Chief Counsel,
Louisiana State Office of Risk Management
P.O. Box 91106
Baton Rouge, Louisiana 70821-9106
Telephone (225) 219-0184
Facsimile (225) 342-8473

Attorneys for Petitioner the State of Louisiana, through the Department of Transportation and Development

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2004 CA 1830

ALBERT M. ROUYEA, individually and
as limited curator for his son, KEITH D. ROUYEA,
and BEVERLY YOUNG ROUYEA

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT, THE PARISH OF ASCENSION,
PRUDENTIAL PROPERTY AND CASUALTY
INSURANCE COMPANY, ABC INSURANCE
COMPANY, JOHN L. PORTER, III,
and JAMES E. TOMPKINS

[BJC
RDD] Judgment Rendered: November 4, 2005

* * * * *

On Appeal from the
23rd Judicial District Court,
In and for the Parish of Ascension,
State of Louisiana
Trial Court No. 41,610

Honorable Thomas J. Kliebert, Jr., Judge Presiding

* * * * *

Paul H. Due
Donald W. Price
B. Scott Andrews
Baton Rouge, LA

Attorneys for Plaintiffs-Appellees,
Albert Rouyea, et al.

[EJJG Concure without Reasons]

Frank J. D'Amico
New Orleans, LA

Stacey Moak
Robert C. Funderburk
Baton Rouge, LA

Attorneys for Defendant-Appellant,
State of Louisiana, Through Dept.
of Transportation and Development

* * * * *

BEFORE: CARTER, C.J., DOWNING, AND GAIDRY, JJ.

CARTER, C. J.

Following a trial on the merits, DOTD ("defendant") appeals a judgment finding it partially at fault for a one-vehicle accident and awarding damages to plaintiffs, a guest passenger and his parents. The issues on appeal revolve around whether the trial court was clearly wrong in finding that the highway in question was defective and unreasonably dangerous, whether the trial court was clearly wrong in allocating 85% fault to the intoxicated driver and 15% fault to defendant, and whether the trial court abused its discretion in the damage amount awarded to plaintiffs.

After a thorough review and evaluation of the record, we are convinced that the reasons assigned by the trial court are correct. We find no manifest error in the trial court's factual conclusion that the curve in the highway was unreasonably dangerous and contributed to the cause of the accident in question.[1] Furthermore, we believe the record supports the conclusion that defendant was 15% at fault for the accident, and we find that the amount of damages awarded does not constitute an abuse of discretion. *See* **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 883 (La. 1993); **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989); and **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1260-61 (La. 1993), *cert.denied*, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

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[1] We also find no error of law in the trial court's admission of and reliance on plaintiffs' exhibit P-31. The evidence was not subject to the shield of 23 U.S.C. §409.

Thus, in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.2A(2), (5), (6), and (8), we affirm the trial court's judgment and assess all costs associated with this appeal, $6,000.00, against defendant.

AFFIRMED.

ALBERT M. ROUYEA, ET AL.	NUMBER: 41,610 DIV.: "B"
	23RD JUDICIAL DISTRICT COURT
VERSUS	PARISH OF ASCENSION
STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL.	STATE OF LOUISIANA

JUDGMENT

(Filed Jul. 15, 2004)

This matter came on for trial on October 6, 7, 16 and November 7, 2003.

Present were:

Paul H. Duè Donald W. Price Duè, Price, Guidry, Piedrahita and Andrews	Counsel for plaintiffs, Albert Rouyea and Beverly Rouyea
Frank D'Amico	Co-Counsel for plaintiffs, Albert Rouyea and Beverly Rouyea
Stacey Moak Stacey Moak & Associates	Counsel for defendant, the State of Louisiana, through the Department of Trans portation and Development
Robert C. Funderburk FUNDERBURK & ANDREWS	Counsel for defendant, the State of Louisiana, through the Department of Trans portation and Development

Evidenced was adduced, post-trial briefs were submitted, and the matter was submitted for judgment. In accordance with the Court's reasons for judgment rendered on June 16, 2004, the law and evidence being in favor thereof:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Albert Rouyea, in his capacity as curator of the interdict, Keith Rouyea, and against defendant, the State of Louisiana, through the Department of Transportation and Development, in the full principal amount of FOUR MILLION SIX HUNDRED THIRTY-SEVEN THOUSAND ONE HUNDRED EIGHTY-THREE AND 40/100 DOLLARS ($4,637,183.40), together with interest thereon from July 15, 1988, the date of judicial demand, until paid, at the full conventional rate set forth pursuant to La. C.C.P. art. 2924.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Albert Rouyea, individually, and against defendant, the State of Louisiana, through the Department of Transportation and Development, in the full principal amount SEVENTY-FIVE THOUSAND AND NO 00/100 DOLLARS ($75,000.00), together with interest thereon from July 15, 1988, the date of judicial demand, until paid, at the full conventional rate set forth pursuant to La. C.C.P. art. 2924.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Beverly Rouyea, individually, and against defendant, the State of Louisiana, through the Department of Transportation and Development, in the full principal amount, of SEVENTY-FIVE THOUSAND AND NO 00/100 DOLLARS

($75,000.00), together with interest thereon from July 15, 1988, the date of judicial demand, until paid, at the full conventional rate set forth pursuant to La. C.C.P. art. 2924.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs will be fixed and taxed pursuant to La. R.S. 13:5112 at a rule to tax costs to be scheduled.

JUDGEMENT READ AND SIGNED at Convent, Louisiana, this 14th day of June, 2004.

/s/ Thomas J. Kliebert, Jr.
JUDGE, 23RD JUDICIAL
DISTRICT COURT

TWENTY-THIRD JUDICIAL DISTRICT COURT

FOR THE PARISH OF ASCENSION

STATE OF LOUISIANA

NO. 41,610 **DIVISION "B"**

ALBERT J. ROUYEA

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

FILED: _____ _____

DEPUTY CLERK

REASONS FOR JUDGMENT

(Filed Jun. 17, 2004)

This suit was brought against the State of Louisiana, through the Department of Transportation and Development (DOTD), by Albert Rouyea, the curator of the interdict, Keith Rouyea, and Beverly Rouyea to recover for injuries Keith Rouyea and the plaintiffs, his parents, suffered as a result of an automobile crash that was allegedly caused by the fault of the DOTD.

On the morning of September 24, 1987, James Tompkins was driving westbound, on Cornerview Road, La. Hwy. 429, with Keith Rouyea and James Gandolfi as passengers. As he tried to negotiate a sharp left-hand curve or turn where Cornerview Road meets New River, Tompkins lost control of the vehicle and hit a tree on the side of the road. Keith Rouyea was seriously injured, and the other passenger was killed.

The posted speed limit in this area was 45 mph, and the estimates of Tompkins' speed from lay and expert

witnesses varied from 45 to 63 mph. There was conflicting testimony as to whether there was some amount of gravel in the roadway at the area where he lost control, which would have reduced the amount of friction available to his tires for the cornering maneuver. DOTD introduced evidence of a computer reconstruction that showed that Tompkins initiated his turning maneuver a fraction of a second late, but DOTD's expert conceded that his reconstruction only showed one way the accident could have happened, rather than the only way the accident could have happened. Although Tompkins denied being intoxicated, DOTD introduced unrebutted expert testimony that his blood alcohol level was approximately .11 percent at the time of the crash.

The plaintiffs contended that in addition to Tompkins' negligence, the DOTD was also negligent and strictly liable for the condition of the highway, and that this condition was a substantial factor in causing the crash. The area of this curve is the only part of Cornerview Road that has never been brought up to modern standards. The road was originally designed as a gravel road in 1923 to have a 10½ degree curve here. Standards promulgated since then have provided for maximum curvatures of 5½ to 6 degrees. The curve was paved in 1952 and again in 1983. The curve as it exists today (which is the same as it was at the time of the crash in 1987) is 14½ to 16 degrees. The curve either was not originally built in accordance with the original design, or it was changed during one of the later projects. In either case, the highway is considered "critically deficient" because its curvature exceeds 8 degrees under the DOTD's own Highway Needs & Priorities Manual, which is not a new design standard but a "cookbook" for evaluating existing roads.

Plaintiffs' expert identified a number of other shortcomings of the highway, such as lane width, superelevation, and other aspects of the highway that do not meet national or DOTD standards promulgated since the early 1940's. These characteristics are all combined into the design speed of the highway, which is a safe speed determined based upon the geometry of the road. According to DOTD, the posted speed limit should never exceed the design speed. DOTD's 1948 standards require a design speed of 60 mph for this type of highway, and a design speed of less than 50 mph is considered critically deficient according to the Highway Needs & Priorities Manual. DOTD's expert testified that the effective design speed of this stretch of Cornerview Road was approximately 30 mph, *some 15 mph less than the posted 45 mph speed, limit.*

Plaintiffs also complained of the unguarded presence of the tree within 10 feet of the edge of the travel lane. New construction standards require a 30 foot clear zone from the edge of the road, while older standards from the 1950's require 15 feet of clearance for trees. No one knew the precise age of the tree that was struck, because it was cut before plaintiffs' forester was able to age it. It is obvious from the police photographs that the tree at issue was probably decades old. It does not seem, however, that DOTD owns the property beyond the edge of the road, as there was no evidence of any right of way being taken by the state for the highway.

DOTD has a duty to design, construct and maintain its highways in accordance with national standards under La. R.S. 48:35. DOTD is required to comply with the standards in effect at the time the highway is constructed or reconstructed. *Hunter v. DOTD*, 620 So.2d 1149, 1151

(La. 1993). Before national standards were published, DOTD was required to use the best engineering judgment in making design, construction and maintenance decisions. *Holloway v. DOTD*, 555 So.2d 1341 (La. 1990). The ultimate question is whether the highway presents an unreasonable risk of harm, and in considering this, the court can consider the standards in effect at the time of the original construction and at the time of the accident. *Dill v. DOTD,* 454 So.2d 994, 996 (La. 1989). The totality of the circumstances must be considered in determining whether the highway presents an unreasonable risk of harm. 97-1938 (La. 4/24/98), 712 So.2d 62. A road's geometry or its roadside can render it unreasonably dangerous. *Aucoin v. DOTD, supra; Molberl v. Toepfer,* 550 So.2d 183 (La. 1989); and *Vervik v. State*, 302 So.2d 895 (La. 1974).

The court finds that James Tompkins was negligent in causing this crash. He was intoxicated at the time of the accident, and his inebriation and his apparent fatigue resulted in him going too fast on the road and beginning his turn too late.

Despite Tompkins' fault, however, the court also finds that this accident would not have happened but for the defective and unreasonably dangerous condition of Cornerview Road. The most significant defect was in the curve itself. The most lenient standard applicable to this road is the use of "best engineering judgment," and the only evidence of this engineering judgment at the time of the road's original construction was the 1923 plans. But the geometry of this relatively high speed asphalt road failed to comply even with the 1923 engineering plans for a gravel road. Whether through negligence in the original construction or, more likely, through failure to exercise good engineering judgment in rebuilding and paving the

road with a hard surface, the road was constructed with a turn that is completely out of place. The DOTD certainly knew or should have known of this condition, since it built the road, which was not built in accordance with the design of its own engineer, inspects the roads frequently and particularly since it did bring the other ends of the road into compliance with modern standards. Were it not for the defective nature of the curve, the court finds that the Tompkins vehicle would more likely than not have been able to negotiate the road without incident.

The court also finds that the DOTD was negligent in failing to either remove the trees or place guardrails in front of them. Over the years it took the trees to grow, DOTD certainly knew or should have known of the hazards presented by such trees growing this close to a roadway, and particularly on the outside edge of an excessively sharp curve. Even if it did not own the trees, and if the adjoining landowner would have objected to the trees being cut (a highly unlikely scenario given the fact that they were cut by someone after the accident), DOTD should have placed guardrails in front of the trees on the outside of the curve so as to protect motorists. DOTD's failure to do so resulted in the Tompkins vehicle striking the tree, which the court finds, was a substantial factor in causing the severity of Keith Rouyea's injuries.

Relying on *Petre v. DOTD,* 2001-0876 (La. 4/3/02), 817 So.2d 1107; *Campbell v. DOTD,* 94-1052 (La. 1/17/95), 648 So.2d 898; and *Toslon v. Pardon,* 2003-1747 (La. 4/23/04), the plaintiffs argue that Tompkins should be cast with no more than 50% fault. The court disagrees. As pointed out by defendant, the cited cases did not require that allocation of fault. The court finds the proper allocation of fault in this case to be 85% to James Tompkins, and 15% to the

DOTD. *Watson v. State Farm Fire,* 469 So.2d 967 (La. 1985).

There was little dispute about the serious injuries suffered by Keith Rouyn and his parents as a result of this incident. As a result of his traumatic encephalopathy, he has required and always will require attendant care 24 hours a day. The court agrees with the testimony of Dr. Clifford that the best place for him is at home with his family, for as long as they are physically able to care for him. The court also finds that the plaintiffs are entitled to recover for the family's gratuitously rendered medical care for 24 hours a day pursuant to *Tanner v. Fireman's Fund Ins. Cos.,* 589 So.2d 507, 515-16 (La. App. 1st Cir. 1991), *writs denied,* 590 So.2d 1207 (La. 1992). Accordingly, the court fixes damages as follows:

Past medical expenses (including gratuitously rendered medical care): $901,035.80 (Nine Hundred One Thousand Thirty-Five Dollars and Eighty Cents)

Future medical expenses: $5,751,905.00 (Five Million Seven Hundred Fifty-One Thousand Nine Hundred Five Dollars and Zero Cents)

Past lost earnings: $367,809.00 (Three Hundred Sixty-Seven Thousand Eight Hundred Nine Dollars and Zero Cents)

Future lost earnings: $503,617.00 (Five Hundred Three Thousand Six Hundred Seventeen Dollars and Zero Cents)

Physical pain and suffering: $750,000.00 (Seven Hundred Fifty Thousand Dollars and Zero Cents)

Mental anguish: $500,000.00 (Five Hundred Thousand Dollars and Zero Cents).

Loss of enjoyment of life: $500,000.00 (Five Hundred Thousand Dollars and Zero Cents)

Loss of consortium for Albert Rouyea: $150,000.00 (One Hundred Fifty Thousand Dollars and Zero Cents)

Loss of consortium for Beverly Rouyea: $150,000.00 (One Hundred Fifty Thousand Dollars and Zero Cents)

Counsel for plaintiffs is instructed to prepare a judgment in accordance with these written reasons.

Signed this 16th day of June 2004 at Convent, Louisiana.

/s/ Thomas J. Kliebert, Jr.
THOMAS J. KLIEBERT, JR.
DIVISION "B"
JUDGE – 23RD
JUDICIAL DISTRICT

PLEASE NOTIFY:

All Counsel of Record

The Supreme Court of the State of Louisiana

ALBERT M. ROUYEA, INDIVIDUALLY
AND AS LIMITED CURATOR FOR
HIS SON, KEITH D. ROUYEA, AND
BEVERLY YOUNG ROUYEA

VS.

NO. 2005-C-2497

LOUISIANA DEPARTMENT OF
TRANSPORTATION AND
DEVELOPMENT, THE PARISH
OF ASCENSION, PRUDENTIAL
PROPERTY AND CASUALTY
INSURANCE COMPANY, ABC
INSURANCE COMPANY,
JOHN L. PORTER, III, AND
JAMES E. TOMPKINS

IN RE: Transportation and Development Department of etal; DOTD; State of Louisiana; – Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Ascension, 23rd Judicial District Court Div. B, Nos. 41,610; to the Court of Appeal, First Circuit, No. 2004-CA-1830

April 17, 2006

Denied.

CDT

PFC

BJJ

JTK

JLW

VICTORY, J., would grant.

Supreme Court of Louisiana
April 17, 2006

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

COURT OF APPEAL

FIRST CIRCUIT

THE STATE OF LOUISIANA

****

DOCKET NO. 2004-CA-1830

****

ALBERT ROUYEA, ET AL

vs.

STATE OF LOUISIANA, ET AL

HONORABLE THOMAS J. KLIEBERT JR.
23RD JUDICIAL DISTRICT COURT
PARISH OF ASCENSION, STATE OF LOUISIANA
NUMBER 41,610 DIV. B

(Filed Sep. 10, 2004)

****

THIS CIVIL CASE COMES BEFORE THIS COURT ON APPEAL

ORIGINAL BRIEF BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, DEFENDANT, APPELLANT

****

STACEY MOAK
SPECIAL ASSISTANT ATTORNEY GENERAL
P.O. BOX 77651
BATON ROUGE, LA 70879-7651
TELEPHONE # (225) 751-6300

ROBERT C. FUNDERBURK
SPECIAL ASSISTANT ATTORNEY GENERAL
329 ST. FERDINAND

BATON ROUGE, LA 70802
TELEPHONE # (225) 387-2200

STACEY MOAK, BAR ROLL NO. 9522
ROBERT C. FUNDERBURK, BAR ROLL NO. 5787
SPECIAL ASSISTANT ATTORNEY GENERAL
APPEAL COUNSEL FOR THE STATE OF
LOUISIANA, THROUGH THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT
DEFENDANT/APPELLANT

* * *

ARGUMENT ON ASSIGNMENT OF ERROR No. 1

The normal burden of proof in a personal injury case is upon the plaintiff ***Ferrell v. Fireman's Fund Ins. Co.***, 650 So.2d 742, 746, 94-1252 (La. 2/20/95), rehearing denied (March 29, 1995). The Rouyea family must show by a preponderance of competent, legal evidence that DOTD is either strictly liable or negligent and that a defect in the road or the negligence of DOTD was a legal cause of the accident. Evidence that is prohibited by federal law cannot be used in the pursuit of this goal. However, in this case, the trial court admitted such evidence[2] and wrote in its reasons for judgment that the evidence played a significant role in its decision. By doing so, he committed legal error.

Of relevance to this case is the Hazard Elimination Program which provides State and local governments with

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[2] The trial court admitted the following exhibit, over objection of defense counsel (Record p. 709 and 727) all of which are protected by 23 U.S.C. § 409:

Exhibit P-31, Highway Needs and Priorties.

Mr. James Clary testified that his opinion on minimum tolerable conditions came from Highway Needs and Priorities. Record p. 785.

funding to improve the most dangerous sections of their roads. In 1958, Congress declared that it was in the national interest to develop a nationwide highway system to be financed through Federal aid (see, ***23 USC § 101[b]***). In furtherance of this objective, in 1966 Congress adopted the Highway Safety Act (see, ***Pierce County v. Guillen, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 2003***). The purpose of the Act was to improve highway safety by encouraging closer federal and State cooperation with respect to road improvement. To further this end, Congress, in 1973, adopted the Highway Hazard Elimination Program. Under the Program, each state was required to systematically prepare and maintain an engineering survey of all public roads. The purpose of the survey was to identify roadside hazards and hazardous conditions, to assign priorities for the correction of hazards, and to establish and to implement a schedule of projects for their improvement.

In 1987, Congress adopted ***23 USC § 409*** (hereinafter "§ 409") which generally provided that information compiled by states pursuant to ***23 USC § 152*** could not be admitted into evidence in any action for damages. § 409 was amended in 1991 to direct that such information not only is not admissible at trial, but also it may not be the subject of discovery.

DOTD submits that the trial court committed an evidentiary error by allowing the admission of safety-related material for which DOTD possesses a privilege of statutory immunity. The provisions of ***§ 409*** state that any "reports, surveys, schedules, lists, or data compiled or collected" for specified federal evaluation programs, or which are gathered for the purpose of a highway safety construction improvement project that "may be implemented

utilizing Federal-aid highway funds" are privileged, not discoverable, and not admissible in state or federal court.

There is no doubt that the publication, Highway Needs and Priorities, admitted into evidence by the trial court, contains information compiled for safety purposes pursuant to § 152. The plaintiffs' expert witness, Mr. James Clary, has admitted this in testimony in another case:

> According to Mr. Clary, a minimum tolerable condition is separate from the design standards promulgated by AASHTO. Mr. Clary testified that DOTD uses the minimum tolerable condition approach as a guide in grading the highway system and determining which roads to place in the construction program. Mr. Clary further testified that DOTD used safety research performed by AASHTO and various research committees in determining what the minimum tolerable conditions should be.

Thornhill v. State Dept. of Transp. and Development, 676 So.2d 799, page 806, 95 1946 (La.App. 1 Cir. 6/28/96), writ denied by ***Riley v. State Through Dept. of Transp. and Development,*** 683 So.2d 272, 96-2014 (La. 11/8/96), and writ denied by ***Riley v. State Through Dept. of Transp. and Development,*** 683 So.2d 272, 96-2021 (La. 11/8/96).

The United States Supreme Court recently had occasion to address the application of 23 U.S.C. § 409 to § 152 information in the case of ***Pierce County,*** *supra,* 123 S.Ct. at 730. The Court held:

> The interpretation proposed by the Government, however, suffers neither of these faults. It gives effect to the 1995 amendment by making clear

> that § 409 protects not just the information an agency generates, i.e., compiles, for § 152 purposes, but also any information that an agency collects from other sources for § 152 purposes. And, it also takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation.

The errors by the trial court in allowing exhibits and testimony concerning information compiled by DOTD under the Program, and basing its opinion that the curve was "critically deficient" because its curvature exceeded eight degrees and its design speed was less than 50 m.p.h., were prejudicial legal errors which interdicted the fact-finding process. When a trial court makes such an error, the manifest error standard is no longer applicable, and the appellate court is obliged to make its own independent, *de novo* review of the record. ***Evans v. Lungrin***, 97-0541, 97-0577, p. 7 (La.2/6/98), 708 So.2d 731, 735; ***McLean v. Hunter***, 495 So.2d 1298, 1303-04 (La.1986). The Supreme Court stated in ***Evans*** that "[l]egal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights." 708 So.2d at 735. The consideration of this protected evidence by the trial court was prejudicial to DOTD and materially affected the outcome of this case. For this reason, this court should conduct a *de novo* review of this case.

* * *

IN THE SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 05 C 2497

****

ALBERT ROUYEA, ET AL
VS.
STATE OF LOUISIANA, ET AL

HONORABLE THOMAS J. KLIEBERT, JR.
23RD JUDICIAL DISTRICT COURT,
PARISH OF ASCENSION
Div. "B" Docket # 41,610

COURT OF APPEAL, FIRST CIRCUIT
DOCKET NO. 2004-CA-1830

(Filed Dec. 9, 2005)

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APPLICATION FOR SUPERVISORY WRITS AND RELIEF BY THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, DEFENDANT/APPLICANT, DIRECTED TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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CHARLES C. FOTI, Jr.
ATTORNEY GENERAL

Stacey Moak, Bar Roll No. 9522
Special Assistant Attorney General
P.O. Box 77651
Baton Rouge, LA 70879-7651
(225) 751-6300

Robert C. Funderburk, Bar Roll No. 5787
Special Assistant Attorney General
329 St. Ferdinand
Baton Rouge, LA 70802
(225) 387-2200

Attorneys for the State of Louisiana,
through the Department of Transportation
and Development Defendant/Applicant

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WRIT GRANT CONSIDERATIONS

1. Conflicting Decisions. The decision of the court of appeal conflicts with a decision of this court and the Supreme Court of the United States, on the same legal issue.

2. Erroneous Interpretation or Application of Constitution or Laws. The court of appeal has erroneously interpreted or applied a law of the United States and the decision will cause material injustice or significantly affect the public interest.

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SUMMARY OF THE ARGUMENT

The trial court committed legal error by allowing into evidence and considering a DOTD report entitled "Highway Needs and Priorities." This report was compiled pursuant to 23 U.S.C. § 152 which created a national Hazard Elimination Program to enhance highway safety and, as such, is inadmissible in evidence as declared in 23 U.S.C. § 409. Such an error of law interdicts the fact-finding process and requires a *de novo* review of the record by the appellate court.

Based primarily on the prohibited evidence, the trial court found that the curve was unreasonably dangerous and assigned 85% fault to the driver and 15% fault to DOTD. Such an apportionment of fault was contrary to the evidence. The driver was familiar with the road, having driven along this route innumerable times before. At the time of the accident he was under the influence of alcohol and had stayed up all night without sleep. Therefore DOTD should be found free of fault.

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ARGUMENT ON ASSIGNMENT OF ERROR No. 1

The normal burden of proof in a personal injury case is upon the plaintiff. ***Ferrell v. Fireman's Fund Ins. Co.***, 650 So.2d 742, 746, 94-1252 (La. 2/20/95), rehearing denied (Mar 29, 1995). So it is for the Rouyea family: they must show by a preponderance of competent, legal evidence that DOTD is either strictly liable or negligent and that a defect in the road or the negligence of DOTD was a legal cause of the accident. Evidence that is prohibited by federal law cannot be used in the pursuit of this goal. However, in this case, the trial court admitted such evidence[1] and wrote in its reasons for judgment that the evidence played a significant role in its decision. By doing so, the court committed legal error.

Of relevance to this case is the Hazard Elimination Program which provides state and local governments with

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[1] The trial court admitted the following exhibit, over objection of defense counsel (Tr. p. 709 and 727) which is protected by 23 U.S.C. § 409: P-31, Highway Needs and Priorities.

Mr. James Clary testified that his opinion on minimum tolerable conditions came from Highway Needs and Priorities. Tr. p. 785.

funding to improve the most dangerous sections of their roads. In 1958 Congress declared that it was in the national interest to develop a nationwide highway system to be financed through Federal aid (see, ***23 USC § 101 [b]***). In furtherance of this objective, Congress, in 1966, adopted the Highway Safety Act (see, ***Pierce County v. Guillen, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 [2003]***). The purpose of the Act was to improve highway safety by encouraging closer federal and state cooperation with respect to road improvement. Towards this end, Congress, in 1973, adopted the Highway Hazard Elimination Program. Under the Program, each state was required to systematically prepare and maintain an engineering survey of all public roads. The purpose of the survey was to identify roadside hazards and hazardous conditions, to assign priorities for the correction of hazards, and to establish and to implement a schedule of projects for their improvement.

In 1987, Congress adopted ***23 USC § 409*** (hereinafter "§ 409") which generally provided that information compiled by States pursuant to ***23 USC § 152*** could not be admitted into evidence in any action for damages. Section 409 was amended in 1991 to direct that such information not only is not admissible at trial, but also it may not be the subject of discovery.

DOTD submits that the trial court committed an evidentiary error by allowing the admission of safety-related material for which DOTD possesses a privilege of statutory immunity. The provisions of ***§ 409*** state that any "reports, surveys, schedules, lists, or data compiled or collected" for specified federal evaluation programs, or which are gathered for the purpose of a highway safety construction improvement project that "may be implemented

utilizing Federal-aid highway funds" are privileged, not discoverable, and not admissible in state or federal court.

There is no doubt that the publication, "Highway Needs and Priorities," admitted into evidence by the trial court, contains information compiled for safety purposes pursuant to § 152. The plaintiffs' expert witness, Mr. James Clary, has admitted this in testimony in another case:

> According to Mr. Clary, a minimum tolerable condition is separate from the design standards promulgated by AASHTO. Mr. Clary testified that DOTD uses the minimum tolerable condition approach as a guide in grading the highway system and determining which roads to place in the construction program. Mr. Clary further testified that DOTD used safety research performed by AASHTO and various research committees in determining what the minimum tolerable conditions should be.

Thornhill v. State Dept. of Transp. and Development, 676 So.2d 799, page 806, 95 1946 (La.App. 1 Cir. 6/28/96), writ denied by ***Riley v. State Through Dept. of Transp. and Development***, 683 So.2d 272, 96-2014 (La. 11/8/96), and writ denied by ***Riley v. State Through Dept. of Transp. and Development***, 683 So.2d 272, 96-2021 (La. 11/8/96).

The United States Supreme Court recently had occasion to address the application of 23 U.S.C. § 409 to § 152 information in the case of ***Guillen***, *supra*, 123 S.Ct. at 730. The Court held:

> The interpretation proposed by the Government, however, suffers neither of these faults. It gives effect to the 1995 amendment by making clear

> that § 409 protects not just the information an agency generates, i.e., compiles, for § 152 purposes, but also any information that an agency collects from other sources for § 152 purposes. And, it also takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation.

This court recently discussed the ***Guillen*** decision in ***Long v. State ex rel. Dept. of Transp. and Development***, ___ So.2d ___, 2005 WL 1527757, Jun 29, 2005. The case dealt with the admissibility of letters under 23 U.S.C. § 409 from the mayor of the town of Bonita to DOTD regarding two accidents at a railroad crossing in the previous eight years, DOTD's response that it planned to signalize the railroad crossing from funds available through a federal safety program and the mayor's response, agreeing to the terms set forth in DOTD's letter. This court wrote:

> We find the reasoning of Guillen and our language in Reichert and Palacios particularly instructive to our inquiry in this case, and therefore consider that instruction in our analysis of the letters introduced by the plaintiffs. In particular, we must keep in mind Congress' goal in enacting § 409, i.e. fostering candor and diligence in information gathering. States must be allowed to compile information without hesitation and fear that information collected may be used against them in private litigation.
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> . . . The letters evidence the commencement of the process in selecting the roadway/railway crossing for improvement and can be compared

> to the letter in Guillen which was originally prepared and maintained by the county sheriff. In fact, the letters herein bear a strong resemblance to the letters held inadmissible in Reichert.
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> . . . Hence, we find these three letters represent information necessary for the commencement of the upgrade for this roadway/railroad crossing, and thus, the letters effectuate the purpose of the federal safety program. Taken as a whole, and in the context of the framework of the purpose of § 409, we find the letters were compiled and collected by the DOTD for purposes related to funding through § 130, a federal safety program. Thus, we find the letters are protected from discovery and are inadmissible under 23 U.S.C. § 409.

DOTD's "Highway Needs and Priorities" publication, wrongly admitted into evidence by the trial court and considered in its opinion, was compiled and collected by DOTD for purposes related to § 152, another federal safety program. As such, it, too, is protected and inadmissible under 23 U.S.C. § 409.

In **Vega v. State**, ___ N.Y.S.2d ___, 2005 WL 3070794, N.Y.Ct.Cl., Oct 13, 2005, claimants alleged that they were injured in an automobile accident which occurred as the result of negligence by the New York State Department of Transportation in failing to rectify a "dangerous intersection" for an unreasonable period of time. The State raised objections to any and all material, testimony and documentary evidence concerning the DOT internal classification of the intersection as a "dangerous intersection." The basis for this objection was 23 USC § 409, "which creates certain evidentiary protections for states which collect or compile data on highway safety for the purposes of

obtaining funding under Section 152 of the federal Hazard Elimination Program." (Page 1.) The court cited ***Guillen*** and held, at page 2:

> . . . ,Section 409 was amended in 1991 and 1995, both times with the obvious congressional intent of strengthening the protections afforded to the states in gathering and compiling information regarding highway safety for purposes of federal funding under Section 152. Although Section 409, as amended, will certainly result in somewhat harsh results for an individual claimant, Congress has made clear that the public policy of encouraging candid study, design and construction of highway safety improvements is paramount. This is a determination correctly left to the legislature and should not be disturbed by the Courts.

Before ***Guillen***, an Alaska court found in ***Walden v. Department of Transp.***,[2] 27 P.3d 297, July 13, 2001, that a Design Study Report prepared by its State Department of Transportation was made for the purpose of planning safety enhancements for or developing a federally funded highway safety construction improvement project was protected by § 409. Louisiana's "Highways Needs and Priorities" is a similar publication in that it is an essential step in identifying state roadways that need upgrading for safety purposes.

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[2] It is interesting to note that in both ***Vega*** and ***Walden*** the plaintiffs obtained the contested information in discovery but were not allowed to use it trial. Both cases found that both DOTs waived only the protection of the statute with respect to discovery, not to its admission in court. Because both DOTs timely objected to use of the information at trial, it is clear that they did not waive the protection of the federal statute with respect to admissibility of the information at trial.

The error by the trial court in allowing the "Highway Needs and Priorities" report and testimony concerning information compiled by DOTD under the Program, and basing its opinion that the curve was "critically deficient" because its curvature exceeded eight degrees and its design speed was less than 50 m.p.h., were prejudicial legal errors which interdicted the fact-finding process. The appellate court compounded the error when it found no error of law by the trial court in this respect. When a trial court makes such an error, the manifest error standard is no longer applicable, and the appellate court is obliged to make its own independent, *de novo* review of the record. ***Evans v. Lundgrin***, 97-0541, 97-0577, p. 7 (La.2/6/98), 708 So.2d 731, 735; ***McLean v. Hunter***, 495 So.2d 1298, 1303-04 (La.1986). The Supreme Court stated in ***Evans*** that "[L]egal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights." 708 So.2d at 735. The consideration of this protected evidence by the trial court was prejudicial to DOTD and materially affected the outcome of this case. For this reason, this court should remand the case to the First Circuit and order it to conduct a *de novo* review of this case.

* * *

United States Code (Statutes)

23 U.S.C.A. § 101. Definitions and declaration of policy

Current through P.L. 109-239 approved 07-03-06

(a) Definitions. – In this title, the following definitions apply:

(1) Apportionment. – The term "apportionment" includes unexpended apportionments made under prior authorization laws.

(2) Carpool project. – The term "carpool project" means any project to encourage the use of carpools and vanpools, including provision of carpooling opportunities to the elderly and individuals with disabilities, systems for locating potential riders and informing them of carpool opportunities, acquiring vehicles for carpool use, designating existing highway lanes as preferential carpool highway lanes, providing related traffic control devices, and designating existing facilities for use for preferential parking for carpools.

(3) Construction. – The term "construction" means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of a highway, including bond costs and other costs relating to the issuance in accordance with section 122 of bonds or other debt financing instruments and costs incurred by the State in performing Federal-aid project related audits that directly benefit the Federal-aid highway program. Such term includes –

(A) locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National

Oceanic and Atmospheric Administration of the Department of Commerce);

(B) resurfacing, restoration, and rehabilitation;

(C) acquisition of rights-of-way;

(D) relocation assistance, acquisition of replacement housing sites, and acquisition and rehabilitation, relocation, and construction of replacement housing;

(E) elimination of hazards of railway grade crossings;

(F) elimination of roadside obstacles;

(G) improvements that directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas; and

(H) capital improvements that directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses.

(4) County. – The term "county" includes corresponding units of government under any other name in States that do not have county organizations and, in those States in which the county government does not have jurisdiction over highways, any local government unit vested with jurisdiction over local highways.

(5) Federal-aid highway. – The term "Federal-aid highway" means a highway eligible for assistance under this chapter other than a highway classified as a local road or rural minor collector.

(6) Federal-aid system. – The term "Federal-aid system" means any of the Federal-aid highway systems described in section 103.

(7) Federal lands highway. – The term "Federal lands highway" means a forest highway, public lands highway, park road, parkway, refuge road, and Indian reservation road that is a public road.

(8) Forest development roads and trails. – The term "forest development roads and trails" means forest roads and trails under the jurisdiction of the Forest Service.

(9) Forest highway. – The term "forest highway" means a forest road under the jurisdiction of, and maintained by, a public authority and open to public travel.

(10) Forest road or trail. – The term "forest road or trail" means a road or trail wholly or partly within, or adjacent to, and serving the National Forest System that is necessary for the protection, administration, and utilization of the National Forest System and the use and development of its resources.

(11) Highway. – The term "highway" includes –

(A) a road, street, and parkway;

(B) a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure, sign, guardrail, and protective structure, in connection with a highway; and

(C) a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States

Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

(12) Indian reservation road. – The term "Indian reservation road" means a public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

(13) Interstate System. – The term "Interstate System" means the Dwight D. Eisenhower National System of Interstate and Defense Highways described in section 103(c).

(14) Maintenance. – The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the highway.

(15) Maintenance area. – The term "maintenance area" means an area that was designated as a nonattainment area, but was later redesignated by the Administrator of the Environmental Protection Agency as an attainment area, under section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(16) National Highway System. – The term "National Highway System" means the Federal-aid highway system described in section 103(b).

(17) Operating costs for traffic monitoring, management, and control. – The term "operating costs for traffic monitoring, management, and control" includes labor costs, administrative costs, costs of utilities and rent, and other costs associated with the continuous operation of traffic control, such as integrated traffic control systems, incident management programs, and traffic control centers.

(18) Operational improvement. – The term "operational improvement" –

(A) means (i) a capital improvement for installation of traffic surveillance and control equipment, computerized signal systems, motorist information systems, integrated traffic control systems, incident management programs, and transportation demand management facilities, strategies, and programs, and (ii) such other capital improvements to public roads as the Secretary may designate, by regulation; and

(B) does not include resurfacing, restoring, or rehabilitating improvements, construction of additional lanes, interchanges, and grade separations, and construction of a new facility on a new location.

(19) Park road. – The term "park road" means a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the National Park System with title and maintenance responsibilities vested in the United States.

(20) Parkway. – The term "parkway", as used in chapter 2 of this title, means a parkway authorized by Act of

Congress on lands to which title is vested in the United States.

(21) Project. – The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title.

(22) Project agreement. – The term "project agreement" means the formal instrument to be executed by the State transportation department and the Secretary as required by section 106.

(23) Public authority. – The term "public authority" means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.

(24) Public lands development roads and trails. – The term "public lands development roads and trails" means those roads and trails that the Secretary of the Interior determines are of primary importance for the development, protection, administration, and utilization of public lands and resources under the control of the Secretary of the Interior.

(25) Public lands highway. – The term "public lands highway" means a forest road under the jurisdiction of and maintained by a public authority and open to public travel or any highway through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations under the jurisdiction of and maintained by a public authority and open to public travel.

(26) Public lands highways. – The term "public lands highways" means those main highways through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations, which are on the Federal-aid systems.

(27) Public road. – The term "public road" means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.

(28) Refuge road. – The term "refuge road" means a public road that provides access to or within a unit of the National Wildlife Refuge System and for which title and maintenance responsibility is vested in the United States Government.

(29) Rural areas. – The term "rural areas" means all areas of a State not included in urban areas.

(30) Safety improvement project. – The term "safety improvement project" means a project that corrects or improves high hazard locations, eliminates roadside obstacles, improves highway signing and pavement marking, installs priority control systems for emergency vehicles at signalized intersections, installs or replaces emergency motorist aid call boxes, or installs traffic control or warning devices at locations with high accident potential.

(31) Secretary. – The term "Secretary" means Secretary of Transportation.

(32) State. – The term "State" means any of the 50 States, the District of Columbia, or Puerto Rico.

(33) State funds. – The term "State funds" includes funds raised under the authority of the State or any

political or other subdivision thereof, and made available for expenditure under the direct control of the State transportation department.

(34) State transportation department. – The term "State transportation department" means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction.

(35) Transportation enhancement activity. – The term "transportation enhancement activity" means, with respect to any project or the area to be served by the project, any of the following activities as the activities relate to surface transportation:

(A) Provision of facilities for pedestrians and bicycles.

(B) Provision of safety and educational activities for pedestrians and bicyclists.

(C) Acquisition of scenic easements and scenic or historic sites (including historic battlefields).

(D) Scenic or historic highway programs (including the provision of tourist and welcome center facilities).

(E) Landscaping and other scenic beautification.

(F) Historic preservation.

(G) Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals).

(H) Preservation of abandoned railway corridors (including the conversion and use of the corridors for pedestrian or bicycle trails).

(I) Inventory, control, and removal of outdoor advertising.

(J) Archaeological planning and research.

(K) Environmental mitigation –

(i) to address water pollution due to highway runoff; or

(ii) reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.

(L) Establishment of transportation museums.

(36) Urban area. – The term "urban area" means an urbanized area or, in the case of an urbanized area encompassing more than one State, that part of the urbanized area in each such State, or urban place as designated by the Bureau of the Census having a population of 5,000 or more and not within any urbanized area, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Such boundaries shall encompass, at a minimum, the entire urban place designated by the Bureau of the Census, except in the case of cities in the State of Maine and in the State of New Hampshire.

(37) Urbanized area. – The term "urbanized area" means an area with a population of 50,000 or more designated by the Bureau of the Census, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Such boundaries shall encompass, at a minimum, the entire urbanized area within a State as designated by the Bureau of the Census.

(38) Advanced truck stop electrification system. – The term "advanced truck stop electrification system" means a system that delivers heat, air conditioning; electricity, or communications to a heavy duty vehicle.

(b) Declaration of policy. –

(1) Acceleration of construction of Federal-aid highway systems. – Congress declares that it is in the national interest to accelerate the construction of Federal-aid highway systems, including the Dwight D. Eisenhower National System of Interstate and Defense, because many of the highways (or portions of the highways) are inadequate to meet the needs of local and interstate commerce for the national and civil defense.

(2) Completion of interstate system. – Congress declares that the prompt and early completion of the Dwight D. Eisenhower National System of Interstate and Defense Highways (referred to in this section as the "Interstate System"), so named because of its primary importance to the national defense, is essential to the national interest. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the forty years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending September 30, 1996, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the

extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

(3) Transportation needs of 21st Century. – Congress declares that –

(A) it is in the national interest to preserve and enhance the surface transportation system to meet the needs of the United States for the 21st Century;

(B) the current urban and long distance personal travel and freight movement demands have surpassed the original forecasts and travel demand patterns are expected to continue to change;

(C) continued planning for and investment in surface transportation is critical to ensure the surface transportation system adequately meets the changing travel demands of the future;

(D) among the foremost needs that the surface transportation system must meet to provide for a strong and vigorous national economy are safe, efficient, and reliable –

(i) national and interregional personal mobility (including personal mobility in rural and urban areas) and reduced congestion;

(ii) flow of interstate and international commerce and freight transportation; and

(iii) travel movements essential for national security;

(E) special emphasis should be devoted to providing safe and efficient access for the type and size of commercial and military vehicles that access designated National Highway System intermodal freight terminals;

(F) the connection between land use and infrastructure is significant;

(G) transportation should play a significant role in promoting economic growth, improving the environment, and sustaining the quality of life; and

(H) the Secretary should take appropriate actions to preserve and enhance the Interstate System to meet the needs of the 21st Century.

(c) It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of Transportation, are necessary to be withheld from obligation for specific periods of time to assure that sufficient amounts will be available in the Highway Trust Fund to defray the expenditures which will be required to be made from such fund.

(d) No funds authorized to be appropriated from the Highway Trust Fund shall be expended by or on behalf of any Federal department, agency, or instrumentality other than the Federal Highway Administration unless funds for such expenditure are identified and included as a line item in an appropriation Act and are to meet obligations of the United States heretofore or hereafter incurred under this title attributable to the construction of Federal-aid highways or highway planning, research, or development, or as otherwise specifically authorized to be appropriated from

the Highway Trust Fund by Federal-aid highway legislation.

(e) It is the national policy that to the maximum extent possible the procedures to be utilized by the Secretary and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out this title and any other provision of law relating to the Federal highway programs shall encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government.

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23 U.S.C.A. § 152. Hazard elimination program

Current through P.L. 109-239 approved 07-03-06

(a) In general. –

(1) Program. – Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(2) Hazards. – In carrying out paragraph (1), a State may, at its discretion –

(A) identify, through a survey, hazards to motorists, bicyclists, pedestrians, and users of highway facilities; and

(B) develop and implement projects and programs to address the hazards.

(b) The Secretary may approve as a project under this section any safety improvement project, including a project described in subsection (a).

(c) Funds authorized to carry out this section shall be available for expenditure on –

(1) any public road;

(2) any public surface transportation facility or any publicly owned bicycle or pedestrian pathway or trail; or

(3) any traffic calming measure.

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the

progress being made to implement safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

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23. U.S.C.A. § 402. Highway safety programs

Current through P.L. 109-239 approved 07-03-06

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage

resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary. Such uniform guidelines shall be expressed in terms of performance criteria. In addition, such uniform guidelines shall include programs (1) to reduce injuries and deaths resulting from motor vehicles being driven in excess of posted speed limits, (2) to encourage the proper use of occupant protection devices (including the use of safety belts and child restraint systems) by occupants of motor vehicles, (3) to reduce deaths and injuries resulting from persons driving motor vehicles while impaired by alcohol or a controlled substance, (4) to prevent accidents and reduce deaths and injuries resulting from accidents involving motor vehicles and motorcycles, (5) to reduce injuries and deaths resulting from accidents involving school buses, and (6) to reduce accidents resulting from unsafe driving behavior (including aggressive or fatigued driving and distracted driving arising from the use of electronic devices in vehicles) (7) to improve law enforcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures. The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs. The program shall provide for annual reports to the Secretary on the efforts being made by the States in reducing deaths and injuries occurring at highway construction sites and the effectiveness and results of

such efforts. The Secretary shall establish minimum reporting criteria for the program. Such criteria shall include, but not be limited to, criteria on deaths and injuries resulting from police pursuits, school bus accidents, aggressive driving, fatigued driving, distracted driving, and speeding, on traffic-related deaths and injuries at highway construction sites and on the configuration of commercial motor vehicles involved in motor vehicle accidents. Such uniform guidelines shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition such uniform guidelines shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light trucks as necessary to improve highway safety, and emergency services. Such guidelines as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations.

(b) Administration of State programs. –

(1) Administrative requirements. – The Secretary may not approve a State highway safety program under this section which does not –

(A) provide that the Governor of the State shall be responsible for the administration of the program through a State highway safety agency which shall have adequate powers and be suitably equipped and organized to carry out, to the satisfaction of the Secretary, such program;

(B) authorize political subdivisions of the State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program if such local highway safety programs are approved by the Governor and are in accordance with the minimum standards established by the Secretary under this section;

(C) except as provided in paragraph (3), provide that at least 40 percent of all Federal funds apportioned under this section to the State for any fiscal year will be expended by the political subdivisions of the State, including Indian tribal governments, in carrying out local highway safety programs authorized in accordance with subparagraph (B);

(D) provide adequate and reasonable access for the safe and convenient movement of individuals with disabilities, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks throughout the State; and

(E) provide satisfactory assurances that the State will implement activities in support of national highway safety goals to reduce motor vehicle related fatalities that also reflect the primary data-related crash factors within a

State as identified by the State highway safety planning process, including –

(i) national law enforcement mobilizations;

(ii) sustained enforcement of statutes addressing impaired driving, occupant protection, and driving in excess of posted speed limits;

(iii) an annual statewide safety belt use survey in accordance with criteria established by the Secretary for the measurement of State safety belt use rates to ensure that the measurements are accurate and representative; and

(iv) development of statewide data systems to provide timely and effective data analysis to support allocation of highway safety resources.

(2) Waiver. – The Secretary may waive the requirement of paragraph (1)(C), in whole or in part, for a fiscal year for any State whenever the Secretary determines that there is an insufficient number of local highway safety programs to justify the expenditure in the State of such percentage of Federal funds during the fiscal year.

(3) Use of technology for traffic enforcement. – The Secretary may encourage States to use technologically advanced traffic enforcement devices (including the use of automatic speed detection devices such as photo-radar) by law enforcement officers.

(c) Funds authorized to be appropriated to carry out this section shall be used to aid the States to conduct the highway safety programs approved in accordance with subsection (a), including development and implementation of manpower training programs, and of demonstration

programs that the Secretary determines will contribute directly to the reduction of accidents, and deaths and injuries resulting therefrom. Such funds shall be apportioned 75 per centum in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census, and 25 per centum in the ratio which the public road mileage in each State bears to the total public road mileage in all States. For the purposes of this subsection, a "public road" means any road under the jurisdiction of and maintained by a public authority and open to public travel. Public road mileage as used in this subsection shall be determined as of the end of the calendar year preceding the year in which the funds are apportioned and shall be certified to by the Governor of the State and subject to approval by the Secretary. The annual apportionment to each State shall not be less than one-half of 1 per centum of the total apportionment, except that the apportionment to the Secretary of the Interior shall not be less than 2 percent of the total apportionment and the apportionments to the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands shall not be less than one-quarter of 1 per centum of the total apportionment. The Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. For the purpose of the seventh sentence of this subsection, a highway safety program approved by the Secretary shall not include any requirement that a State implement such a program by adopting or enforcing any law, rule, or regulation based on a guideline promulgated by the Secretary under this section requiring any motorcycle operator eighteen years of age or older or passenger eighteen years

of age or older to wear a safety helmet when operating or riding a motorcycle on the streets and highways of that State. Implementation of a highway safety program under this section shall not be construed to require the Secretary to require compliance with every uniform guideline, or with every element of every uniform guideline, in every State. Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. The Secretary shall consider the gravity of the State's failure to have or implement an approved program in determining the amount of the reduction. The Secretary shall promptly apportion to the State the funds withheld from its apportionment if he approves the State's highway safety program or determines that the State has begun implementing an approved program, as appropriate, prior to the end of the fiscal year for which the funds were withheld. If the Secretary determines that the State did not correct its failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula specified in this subsection not later than 30 days after such determination.

(d) All provisions of chapter 1 of this title that are applicable to National Highway System highway funds other than provisions relating to the apportionment formula and provisions limiting the expenditure of such funds to the Federal-aid systems, shall apply to the

highway safety funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section, and except that the aggregate of all expenditures made during any fiscal year by a State and its political subdivisions (exclusive of Federal funds) for carrying out the State highway safety program (other than planning and administration) shall be available for the purpose of crediting such State during such fiscal year for the non-Federal share of the cost of any project under this section (other than one for planning or administration) without regard to whether such expenditures were actually made in connection with such project and except that, in the case of a local highway safety program carried out by an Indian tribe, if the Secretary is satisfied that an Indian tribe does not have sufficient funds available to meet the non-Federal share of the cost of such program, he may increase the Federal share of the cost thereof payable under this Act to the extent necessary. In applying such provisions of chapter 1 in carrying out this section the term "State transportation department" as used in such provisions shall mean the Governor of a State for the purposes of this section.

(e) Uniform guidelines promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate.

(f) The Secretary may make arrangements with other Federal departments and agencies for assistance in the preparation of uniform guidelines for the highway safety programs contemplated by subsection (a) and in the administration of such programs. Such departments and

agencies are directed to cooperate in such preparation and administration, on a reimbursable basis.

(g) Nothing in this section authorizes the appropriation or expenditure of funds for (1) highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into guidelines) or (2) any purpose for which funds are authorized by section 403 of this title.

[**(h)** Repealed. Pub. L. 97-35, Title XI, § 1107(c), Aug. 13, 1981, 95 Stat. 626]

(i) Application in Indian country. –

(1) Use of terms. – For the purpose of application of this section in Indian country, the terms "State" and "Governor of a State" include the Secretary of the Interior and the term "political subdivision of a State" includes an Indian tribe.

(2) Expenditures for local highway programs. – Notwithstanding subsection (b)(1)(C), 95 percent of the funds apportioned to the Secretary of the Interior under this section shall be expended by Indian tribes to carry out highway safety programs within their jurisdictions.

(3) Access for individuals with disabilities. – The requirements of subsection (b)(1)(D) shall be applicable to Indian tribes, except to those tribes with respect to which the Secretary determines that application of such provisions would not be practicable.

(4) Indian country defined. – In this subsection, the term "Indian country" means –

(A) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;

(B) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a State; and

(C) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments.

(j) Rulemaking proceeding. – The Secretary may periodically conduct a rulemaking process to identify highway safety programs that are highly effective in reducing motor vehicle crashes, injuries, and deaths. Any such rulemaking shall take into account the major role of the States in implementing such programs. When a rule promulgated in accordance with this section takes effect, States shall consider these highly effective programs when developing their highway safety programs.

(k)(1) Subject to the provisions of this subsection, the Secretary shall make a grant to any State which includes, as part of its highway safety program under section 402 of this title, the use of a comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety recordkeeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary under this section. Notwithstanding any other provision of law, if a report, list,

schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

(2) No State may receive a grant under this subsection in more than two fiscal years.

(3) The amount of the grant to any State under this subsection for the first fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1985 under this section. The amount of a grant to any State under this subsection for the second fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1986 under this section.

(4) A State is eligible for a grant under this subsection if –

(A) it certifies to the Secretary that it has in operation a computerized traffic safety recordkeeping system and identifies proposed means of upgrading the system acceptable to the Secretary; or

(B) it provides to the Secretary a plan acceptable to the Secretary for establishing and maintaining a computerized traffic safety recordkeeping system.

(5) The Secretary, after making the deduction authorized by the second sentence of subsection (c) of this section for fiscal years 1985 and 1986, shall set aside 10 per centum of the remaining funds authorized to be appropriated to carry out this section for the purpose of making grants under this subsection. Funds set aside under this subsection shall remain available for the fiscal year authorized

and for the succeeding fiscal year and any amounts remaining unexpended at the end of such period shall be apportioned in accordance with the provisions of subsection (c) of this section.

(l) Law enforcement vehicular pursuit training. – A State shall actively encourage all relevant law enforcement agencies in such State to follow the guidelines established for vehicular pursuits issued by the International Association of Chiefs of Police that are in effect on the date of enactment of this subsection or as revised and in effect after such date as determined by the Secretary.

(m) Consolidation of grant applications. – The Secretary shall establish an approval process by which a State may apply for all grants under this chapter through a single application process with one annual deadline. The Bureau of Indian Affairs shall establish a similar simplified process for applications for grants from Indian tribes under this chapter.

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23 U.S.C.A. § 409. Discovery and admission as evidence of certain reports and surveys

Current through P.L. 109-239 approved 07-03-06

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing

Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

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28 U.S.C.A. § 1257. State courts; certiorari

Current through P.L. 109-239 approved 07-03-06

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Code of Federal Regulations

23 C.F.R. Pt. 630 Subpart A. Project Authorization and Agreements (Refs & Annos)

Current through June 30, 2006; 71 FR 37805

§ 630.102 Purpose.

The purpose of this subpart is to prescribe policies for authorizing Federal-aid projects through execution of the project agreement required by 23 U.S.C. 106(a)(2).

§ 630.104 Applicability.

(a) This subpart is applicable to all Federal-aid projects unless specifically exempted.

(b) Other projects which involve special procedures are to be approved, or authorized as set out in the implementing instructions or regulations for those projects.

§ 630.106 Authorization to proceed and Project Monitoring.

(a)(1) The State transportation department (STD) must obtain an authorization to proceed from the FHWA before beginning work on any Federal-aid project. The STD may request an authorization to proceed in writing or by electronic mail for a project or a group of projects.

(2) The FHWA will issue the authorization to proceed either through or after the execution of a formal project agreement with the State. The agreement can be executed only after applicable prerequisite requirements of Federal laws and implementing regulations and directives are satisfied. Except as provided in paragraphs (c)(1) through (c)(4) of this section, the FHWA will obligate Federal funds in the project or group of projects upon execution of the project agreement.

(3) The State's request that Federal funds be obligated shall be supported by a documented cost estimate that is based on the State's best estimate of costs.

(4) The State shall maintain a process to adjust project cost estimates. For example, the process would require a review of the project cost estimate when the bid is approved, a project phase is completed, a design change is approved, etc. Specifically, the State shall revise the Federal funds obligated within 90 days after it has determined that the estimated Federal share of project costs has decreased by $250,000 or more.

(5) The State shall review, on a quarterly basis, inactive projects (for the purposes of this subpart an "inactive project" means a project for which no expenditures have been charged against Federal funds for the past 12 months) with unexpended Federal obligations and shall revise the Federal funds obligated for a project within 90 days to reflect the current cost estimate, based on the following criteria:

(i) Projects inactive for the past 12 months with unexpended balances more than $500,000,

(ii) Projects inactive for the past 24 months with unexpended balances of $50,000 to $500,000, and

(iii) Projects inactive for the past 36 months with unexpended balances less than $50,000.

(6) If the State fails to comply with the requirements of paragraphs (a)(3), (4), or (5) of this section, then the FHWA shall revise the obligations or take such other action as authorized by 23 CFR 1.36. The FHWA shall advise the State of its proposed actions and provide the State with the opportunity to respond before actions are taken. The

FHWA shall not adjust obligations without a State's consent during the August redistribution process, August 1 to September 30.

(b) Federal funds shall not participate in costs incurred prior to the date of a project agreement except as provided by 23 CFR 1.9(b).

(c) The execution of the project agreement shall be deemed a contractual obligation of the Federal government under 23 U.S.C. 106 and shall require that appropriate funds be available at the time of authorization for the agreed Federal share, either pro rata or lump sum, of the cost of eligible work to be incurred by the State except as follows:

(1) Advance construction projects authorized under 23 U.S.C. 115.

(2) Projects for preliminary studies for the portion of the preliminary engineering and right-of-way (ROW) phase(s) through the selection of a location.

(3) Projects for ROW acquisition in hardship and protective buying situations through the selection of a particular location. This includes ROW acquisition within a potential highway corridor under consideration where necessary to preserve the corridor for future highway purposes. Authorization of work under this paragraph shall be in accord with the provisions of 23 CFR part 710.

(4) In special cases where the Federal Highway Administrator determines it to be in the best interest of the Federal-aid highway program.

(d) For projects authorized to proceed under paragraphs (c)(1) through (c)(4) of this section, the executed project

agreement shall contain the following statement: "Authorization to proceed is not a commitment or obligation to provide Federal funds for that portion of the undertaking not fully funded herein."

(e) For projects authorized under paragraphs (c)(2) and (c)(3) of this section, subsequent authorizations beyond the location stage shall not be given until appropriate available funds have been obligated to cover eligible costs of the work covered by the previous authorization.

(f)(1) The Federal-aid share of eligible project costs shall be established at the time the project agreement is executed in one of the following manners:

(i) Pro rata, with the agreement stating the Federal share as a specified percentage; or

(ii) Lump sum, with the agreement stating that Federal funds are limited to a specified dollar amount not to exceed the legal pro rata.

(2) The pro-rata or lump sum share may be adjusted before or shortly after contract award to reflect any substantive change in the bids received as compared to the STD's estimated cost of the project at the time of FHWA authorization, provided that Federal funds are available.

(3) Federal participation is limited to the agreed Federal share of eligible costs actually incurred by the State, not to exceed the maximum permitted by enabling legislation.

(g) The State may contribute more than the normal non-Federal share of title 23, U.S.C. projects. In general, financing proposals that result in only minimal amounts of Federal funds in projects should be avoided unless they are based on sound project management decisions.

(h)(1) Donations of cash, land, material or services may be credited to the State's non-Federal share of the participating project work in accordance with title 23, U.S.C., and implementing regulations.

(2) Contributions may not exceed the total costs incurred by the State on the project. Cash contributions from all sources plus the Federal funds may not exceed the total cost of the project.

§ 630.108 Preparation of agreement.

(a) The STD shall prepare a project agreement for each Federal-aid project.

(b) The STD may develop the project agreement in a format acceptable to both the STD and the FHWA provided the following are included:

(1) A description of each project location including State and project termini;

(2) The Federal-aid project number;

(3) The work covered by the agreement;

(4) The total project cost and amount of Federal funds under agreement;

(5) The Federal-aid share of eligible project costs expressed as either a pro rata percentage or a lump sum as set forth in § 630.106(f)(1);

(6) A statement that the State accepts and will comply with the agreement provisions set forth in § 630.112;

(7) A statement that the State stipulates that its signature on the project agreement constitutes the making of the certifications set forth in § 630.112; and

(8) Signatures of officials from both the State and the FHWA, and the date executed.

(c) The project agreement should also document, by comment, instances where:

(1) The State is applying amounts of credits from special accounts (such as the 23 U.S.C. 120(j) toll credits, 23 U.S.C. 144(n) off-system bridge credits and 23 U.S.C. 323 land value credits) to cover all or a portion of the normal percent non-Federal share of the project;

(2) The project involves other arrangements affecting Federal funding or non-Federal matching provisions, including tapered match, donations, or use of other Federal agency funds, if known at the time the project agreement is executed; and

(3) The State is claiming finance related costs for bond and other debt instrument financing (such as payments to States under 23 U.S.C. 122).

(d) The STD may use an electronic version of the agreement as provided by the FHWA.

§ 630.110 Modification of original agreement.

(a) When changes are needed to the original project agreement, a modification of agreement shall be prepared. Agreements should not be modified to replace one Federal fund category with another unless specifically authorized by statute.

(b) The STD may develop the modification of project agreement in a format acceptable to both the STD and the FHWA provided the following are included:

(1) The Federal-aid project number and State;

(2) A sequential number identifying the modification;

(3) A reference to the date of the original project agreement to be modified;

(4) The original total project cost and the original amount of Federal funds under agreement;

(5) The revised total project cost and the revised amount of Federal funds under agreement;

(6) The reason for the modifications; and,

(7) Signatures of officials from both the State and the FHWA and date executed.

(c) The STD may use an electronic version of the modification of project agreement as provided by the FHWA.

§ 630.112 Agreement provisions.

(a) The State, through its transportation department, accepts and agrees to comply with the applicable terms and conditions set forth in title 23, U.S.C., the regulations issued pursuant thereto, the policies and procedures promulgated by the FHWA relative to the designated project covered by the agreement, and all other applicable Federal laws and regulations.

(b) Federal funds obligated for the project must not exceed the amount agreed to on the project agreement, the balance of the estimated total cost being an obligation of the State. Such obligation of Federal funds extends only to project costs incurred by the State after the execution of a formal project agreement with the FHWA.

(c) The State must stipulate that as a condition to payment of the Federal funds obligated, it accepts and will comply with the following applicable provisions:

(1) Project for acquisition of rights-of-way. In the event that actual construction of a road on this right-of-way is not undertaken by the close of the twentieth fiscal year following the fiscal year in which the project is authorized, the STD will repay to the FHWA the sum or sums of Federal funds paid to the transportation department under the terms of the agreement. The State may request a time extension beyond the 20-year limit with no repayment of Federal funds, and the FHWA may approve this request if it is considered reasonable.

(2) Preliminary engineering project. In the event that right-of-way acquisition for, or actual construction of, the road for which this preliminary engineering is undertaken is not started by the close of the tenth fiscal year following the fiscal year in which the project is authorized, the STD will repay to the FHWA the sum or sums of Federal funds paid to the transportation department under the terms of the agreement. The State may request a time extension for any preliminary engineering project beyond the 10-year limit with no repayment of Federal funds, and the FHWA may approve this request if it is considered reasonable.

(3) Drug-free workplace certification. By signing the project agreement, the STD agrees to provide a drug free workplace as required by 49 CFR part 29, subpart F. In signing the project agreement, the State is providing the certification required in appendix C to 49 CFR part 29, unless the State provides an annual certification.

(4) Suspension and debarment certification. By signing the project agreement, the STD agrees to fulfill the responsibility imposed by 49 CFR 29.510 regarding debarment, suspension, and other responsibility matters. In signing the project agreement, the State is providing the

certification for its principals required in appendix A to 49 CFR part 29.

(5) Lobbying certification. By signing the project agreement, the STD agrees to abide by the lobbying restrictions set forth in 49 CFR part 20. In signing the project agreement, the State is providing the certification required in appendix A to 49 CFR part 20.

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23 C.F.R. § 924.1 Purpose.

Current through June 30, 2006; 71 FR 37805

The purpose of this regulation is to set forth policy for the development and implementation of a comprehensive highway safety improvement program in each State.

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23 C.F.R. § 924.5 Policy.

Current through June 30, 2006; 71 FR 37805

Each State shall develop and implement, on a continuing basis, a highway safety improvement program which has the overall objective of reducing the number and severity of accidents and decreasing the potential for accidents on all highways.

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23 C.F.R. § 924.9 Planning.

Current through June 30, 2006; 71 FR 37805

(a) The planning component of the highway safety improvement program shall incorporate:

(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience or accident potential;

(3) A process for conducting engineering studies of hazardous locations, sections, and elements to develop highway safety improvement projects as defined in 23 U.S.C. 101(a); and

(4) A process for establishing priorities for implementing highway safety improvement, projects, considering:

(i) The potential reduction in the number and/or severity of accidents,

(ii) The cost of the projects and the resources available,

(iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula,

(iv) Onsite inspection of public grade crossings,

(v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials, and

(vi) Other criteria as appropriate in each State.

(b) In planning a program of safety improvement projects at railroad-highway grade crossings, special emphasis

shall be given to the legislative requirement that all public crossings be provided with standard signing.

(c) The planning component of the highway safety improvement program may be financed with funds made available through 23 U.S.C. 402, 307(c), and, where applicable, 104(f).

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23 C.F.R. § 924.11 Implementation.

Current through June 30, 2006; 71 FR 37805

(a) The implementation component of the highway safety improvement program in each State shall include a process for scheduling and implementing safety improvement projects in accordance with (1) the procedures set forth in 23 CFR Part 630, Subpart A (Federal-Aid Program Approval and Project Authorization) and (2) the priorities developed in accordance with § 924.9. The States are encouraged to utilize the timesaving procedures incorporated in FHWA directives for the minor type of work normal to highway safety improvement projects.

(b) Funds apportioned under 23 U.S.C. 152, Hazard Elimination Program, are to be used to implement highway safety improvement projects on any public road other than Interstate.

(c) Funds apportioned under Section 203(b) of the Highway Safety Act of 1973, as amended, Rail-Highway Crossings, are to be used to implement railroad-highway grade crossing safety projects on any public road. At least 50 percent of the funds apportioned under Section 203(b) must be made available for the installation of grade crossing protective devices. The railroad share, if any, of

the cost of grade crossing improvements shall be determined in accordance with 23 CFR Part 646, Subpart B (Railroad-Highway Projects).

(d) Highway safety improvement projects may be implemented on the Federal-aid system with funds apportioned under 23 U.S.C. 104(b), and with funds apportioned under Section 104(b)(1) of the Federal-Aid Highway Act of 1978 and Section 103(a) of the Highway Improvement Act of 1982, if excess to Interstate System needs.

(e) Funds apportioned under 23 U.S.C. 219, Safer Off-System Roads, may be used to implement highway safety improvement projects on public roads which are not on a Federal-aid system.

(f) Major safety defects on bridges, including related approach improvements, may be corrected as part of a bridge rehabilitation project on any public road with funds apportioned under 23 U.S.C. 144, if such project is considered eligible under 23 CFR Part 650, Subpart D (Special Bridge Replacement Program).

(g) Award of contracts for highway safety improvement programs shall be in accordance with 23 CFR Part 635.

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23 C.F.R. § 924.13 Evaluation.

Current through June 30, 2006; 71 FR 37805

(a) The evaluation component of the highway safety improvement program in each State shall include a process for determining the effect that highway safety improvement projects have in reducing the number and severity of accidents and potential accidents, including:

(1) The cost of, and the safety benefits derived from the various means and methods used to mitigate or eliminate hazards,

(2) A record of accident experience before and after the implementation of a highway safety improvement, project, and

(3) A comparison of accident numbers, rates, and severity observed after the implementation of a highway safety improvement project with the accident numbers, rates, and severity expected if the improvement had not been made.

(b) The findings resulting from the evaluation process shall be incorporated as basic source data in the planning process outlined in § 924.9(a).

(c) The evaluation component may be financed with funds made available through 23 U.S.C. 402, 307(c), and, where applicable, 104(f). In addition, when highway safety improvement projects are undertaken with funds apportioned under 23 U.S.C. 152 or Section 203 of the Highway Safety Act of 1973, as amended, these funds may also be used to evaluate the improvements.

(2)

No. 06-80

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, ET AL.,

Petitioners,

vs.

ALBERT ROUYEA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL H. DUÉ
Counsel of Record
DONALD W. PRICE
B. SCOTT ANDREWS
DUÉ, PRICE, GUIDRY, PIEDRAHITA & ANDREWS
(A Professional Association – Not a Partnership)
8201 Jefferson Highway
Baton Rouge, LA 70809
Telephone: (225) 929-7481
Facsimile: (225) 924-4519

FRANK J. D'AMICO
1447 First National Bank of Commerce Bldg.
210 Baronne Street
New Orleans, LA 70112
Telephone: (504) 588-9053

Attorneys for Respondents, Albert Rouyea, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Is a manual that sets forth procedures and standards for general application in the evaluation and comparison of highways, but that does not mention, address or contain information about any specific location, including the location at issue, a document that must be excluded from evidence under 23 U.S.C. § 409 in an action for damages arising from a highway defect?

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STATEMENT OF THE CASE

On the morning of September 24, 1987, Keith Rouyea was a passenger in a vehicle being driven westbound on Cornerview Road, La. Hwy. 429, in Ascension Parish, Louisiana, by James Tompkins. Where it meets New River, Cornerview Road curves sharply to the left along the bank. As he entered the sharp left turn, Tompkins lost friction and thus control of the vehicle, and his car skidded off the road. The passenger side of the vehicle struck one of a line of trees along the edge of the highway. Keith Rouyea suffered a severe closed head injury ultimately diagnosed as traumatic encephalopathy; the other passenger, James Gandolfi, was killed. The plaintiffs and respondents are Keith Rouyea's parents and curator; they brought this suit against petitioner, the State of Louisiana, through the Department of Transportation and Development ("DOTD"), the designer, builder, owner and custodian of the road where the crash occurred.

Louisiana Revised Statutes 48:35 imposes upon DOTD a duty to design, construct and maintain its highways in accordance with national standards, which consist primarily of those promulgated by the American Association of State Highway and Transportation Officials ("AASHTO") or its predecessor, the American Association of State Highway Officials ("AASHO"). Under Louisiana law, the applicable standard for determining whether DOTD negligently failed to comply is the standard in effect at the time the highway is constructed or reconstructed. See, e.g., *Hunter v. Department of Transp. & Dev.*, 620 So.2d 1149, 1151 (La. 1993). In addition, however, because this case arose in 1987, so-called "strict liability" under the former version of La. C.C. article 2317 applies. In determining whether a highway poses an

unreasonable risk of harm (or is "defective" for strict liability purposes), the factfinder may consider not only the standards in effect at the time of construction, but those in effect at the time of the accident. See, e.g., *Dill v. State*, 545 So.2d 994, 996 (La. 1989).

Cornerview Road was originally designed in 1923 and was brought into the Louisiana state highway system in 1924. The original plans for Project 77-30-01 called for a gravel road, and the curve where this crash occurred was designed as a ten and a half degree curve. (Exhibit P-11.) The next project in the area of the curve was Project 77-30-05 in 1952 (Exhibit P-13, Israel dep. Exhibit 8), in which the highway department constructed a new base and hard-surfaced the road. According to DOTD's Roadway Plan Preparation Manual (Exhibit P-15) and the Federal Highway Administration's "Designing Safer Roads" manual (Exhibit P-14), this project constituted a reconstruction of the highway because it consisted of the complete removal and replacement of the pavement structure. In 1983, Project 77-30-16 (Exhibit P-13, Israel dep. Exhibit 9) again resulted in construction of a new base and asphalt wearing courses. Again, according to both DOTD and FHWA definitions, this was a reconstruction which required that the highway be brought into compliance with then – current design standards, in this case the 1980 standards admitted as Exhibit P-15. Plaintiffs' expert also testified that the change in the centerline when the road was paved – and the resulting change in the road's geometry – constituted reconstruction that required the application of then-current design standards.

Cornerview Road in the area of this crash was defective in numerous ways. Perhaps the most significant defect was the excessive degree of curvature. The road was

originally designed in 1923 to have a ten and a half degree curve in this area (Exhibit P-11), but the curve was shown to be approximately sixteen degrees in a survey performed after the accident. (R. 633.) This curvature far exceeded not only the original design, but state and national standards that, since at least the 1940s, have provided that the maximum degree of curvature on this class of roadway should be six degrees, while 1980 standards limit curvature to five and a half degrees. (See, e.g., Exhibits P-16A, -15.)

Because of its excessive curvature, the highway was deficient in other ways, including having an excessive speed limit and inadequate lane width and superelevation. Even absent the excessive curvature, Cornerview Road failed to meet many other requirements of the applicable standards. The shoulder width was less than the 1948 requirement of five-foot shoulders and the 1980 requirement of eight-foot shoulders. (Exhibits P-16A, -15.) The slope of the roadside in several places exceeded the 1948 maximum of three to one, as well as the 1980 maximum of four to one. (Id.) And as early as 1954 it was recommended that trees should be offset fifteen feet from the roadway, while more recent standards called for a thirty-foot clear zone. The tree struck by the Tompkins vehicle was only ten feet from the edge of the asphalt. All of these conditions constituted defects of either design and construction (if DOTD originally built the road in this manner) or of maintenance (if DOTD allowed the road to degenerate to this defective condition).

The design speed of a highway is the speed that is chosen for the geometric design of the highway – pavement width, shoulder width, superelevation and horizontal curvature, for instance. Design standards call for the use

of particular design speeds for particular classes of highways. One can, however, determine the "effective" design speed of a highway by comparing the geometric characteristics of the highway to the requirements for particular design speeds. Under DOTD's 1948 standards (Exhibit P-16A), a design speed of 60 mph was required for this class of road. A DOTD design engineer testified that the speed limit of a particular highway should never be greater than the design speed. (R. 1162.) But DOTD's own retained expert testified that the design speed of this stretch of Cornerview Road was approximately 30 mph, some 15 mph less than the posted speed limit. (R. 1094-95.)

It was not disputed that the area of this curve is the only part of Cornerview Road that has never been brought up to modern standards. To the west, DOTD conceded that a full reconstruction to current standards was performed in 1955 as Project 77-30-06. (Exhibit P-47.) This project ended approximately eight-tenths of a mile from the accident site. To the east, the direction from which Tompkins approached the curve, a full reconstruction to current standards was performed in 1985 as Project 77-30-17. (Exhibit P-49.) This project ended within sight of the curve where the accident happened, only four-tenths of a mile to the east. Ironically, that project incorporated a design speed of 60 mph, while the actual speed limit in that area was 30 mph. When a motorist leaves that area, the speed limit rises to 45 mph, while the effective design speed drops to 35 mph.

Yet despite the numerous geometric defects in Cornerview Road, this tragedy could have been avoided had DOTD taken one of two simple steps: They could have removed the trees that lined the road, or they could have provided a barrier in front of the trees. If either of those

simple, inexpensive measures had been taken, the effects of this accident would have been drastically ameliorated. Instead, Tompkins' vehicle struck a fixed, unyielding tree, resulting in Keith Rouyea's catastrophic brain injuries.

In sum, at the time of this crash, Cornerview Road consisted of two relatively modern stretches of highway, connected in the middle by 1.2 miles of road that, although undifferentiated from the other areas in any way, both failed to meet the design standards set forth in the plans for its construction as a gravel road in 1923 and presented treacherous consequences for those who strayed from its twisting route. The geometric defects removed Tompkins' margin of error in negotiating the curve. The roadside defects made it impossible for him to recover once he lost control.

The plaintiffs introduced a plethora of design, maintenance and evaluation standards, from DOTD, AASHO and AASHTO. These standards dated from 1940 through the date of the accident. Among the standards introduced was Exhibit P-31, a DOTD document called the Highway Needs and Priorities manual, of which the petition complains. As was the case with its application to the Louisiana Supreme Court, petitioner did not see fit to attach a copy of this exhibit to its petition; it is reproduced here at App. 1. This manual is used to produce the Highway Needs summary, which catalogs data concerning all of DOTD's highways and compares them to standards called "minimum tolerable conditions," which are less rigorous than current design standards. (App. 3.) Exhibit P-31 is *not* the compiled engineering survey summary data of all public roads in Louisiana. Rather, it is an excerpt from the manual that the Louisiana DOTD uses to collect and

prepare that summary of data. As plaintiffs' expert testified:

> [T]he highway needs and priorities *manual* is one that tells them what to pick up and how and what to compare it with. And the highway needs and priorities – I mean the highway needs *summary* is just a physical assessment of what they have. (R. 785 [emphasis added].)

As is apparent from an examination of the document, the manual has nothing to do with any particular road or compilation of data on specific highways. (R. 710.) DOTD objected to the introduction of the manual on the basis of 23 U.S.C. § 409; the trial judge admitted the evidence after finding that the manual was not a compilation subject to protection under § 409. (R. 720.)

After a four-day bench trial in October and November of 2003, the trial court found Tompkins 85% at fault and DOTD 15% at fault, and the court fixed damages at $9,274,366.80 for Keith Rouyea and $150,000.00 each for his parents, Albert and Beverly Rouyea. (Reasons for Judgment, R. 425; Petition App. 8.)[1] Judgment was rendered on July 14, 2004 (R. 432; Petition App. 5), and the DOTD appealed (R. 435). In an unpublished opinion, the Louisiana First Circuit Court of Appeal summarily affirmed the trial court's decision. (Petition App. 1.) The DOTD then sought writs of certiorari and/or review from the Louisiana Supreme Court; that court denied the

[1] These amounts were reduced by fifty percent to reflect the fault assigned to Tompkins pursuant to the then-current version of La. C.C. article 2324, which provided for a modified solidary, or joint and several, liability.

application on April 17, 2006. (Petition App. 15.) DOTD now seeks certiorari from this Court.

ARGUMENT

1. This case does not present an issue of the application of § 409 to information compiled before its passage, because the date the information was compiled was not the basis for the Louisiana courts' decisions.

The petitioner's second question presented, concerning the temporal application of § 409, is a straw man. After quoting the trial judge's initial reaction to the offer of P-31 (Petition p. 5), petitioner concludes, "It appears that his reason for [allowing the evidence] was based on the fact that this document is dated in 1983 and Congress did not create § 409 until 1987." (Petition p. 17.) Petitioner did not make this argument in the state court of appeal (Petition App. 17-21) or the state supreme court (Petition App. 23-30), because it is not correct. Although that was the trial judge's initial reaction to the document (R. 712), he ultimately delayed deciding the issue of admissibility until the next morning. (R. 713.) The next morning, he decided to admit the document and stated his reason for doing so: "I'm going to admit P-31 as not having been in [*sic* – a] compilation; therefore, it does not come under [the] purview of 409." (R. 720.) The Louisiana First Circuit Court of Appeal agreed, stating in its opinion, "The evidence was not subject to the shield of 23 U.S.C. § 409." Petition App. 3, n.1. The suggestion that the Louisiana courts erred by refusing to apply § 409 retroactively is wrong.

2. The Highway Needs and Priorities manual is outside the scope of § 409.

23 U.S.C. § 409 applies to "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites [or] hazardous roadway conditions . . . pursuant to [certain federal statutes] or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds," and it prohibits the discovery or admission of such evidence "in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." The purpose of the statute is to prevent federal aid requirements from becoming "an effort-free tool in litigation against state and local governments." *Pierce County v. Guillen*, 537 U.S. 129, 146, 123 S.Ct. 720, 731, 154 L.Ed.2d 610 (2003).

Because § 409 creates a privilege for otherwise relevant evidence, this Court has held that it must be narrowly construed. *Pierce County v. Guillen*, 537 U.S. at 145, 123 S.Ct. at 730. The burden of proving the applicability of a privilege generally rests with the party asserting the privilege. *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987); cf. *In re Grand Jury*, 603 F.2d 469, 474 (3rd Cir. 1979) ("To the extent that the record is ambiguous as to the elements which are necessary to establish the claim of privilege, 'The burden of proving that the . . . privilege applies is placed upon the party asserting the privilege,'" quoting *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978)). This is true of the § 409 privilege as well. *Powers v. CSX Transportation*, 177 F.Supp.2d 1276

(S.D. Ala. 2001). And as the court of appeals stated in *In re Bonnanno*, 344 F.2d 830, 833 (2d Cir. 1965), this burden "is not, of course, discharged by conclusory or ipse dixit assertions."

The Highway Needs and Priorities manual does not fall within a literal reading of the scope of § 409 for at least three reasons. The first, and most obvious, reason is that the document does not mention or address any specific location. Evidence is excluded under § 409 only in an "action for damages arising from any occurrence at a location mentioned or addressed" in the document; this prevents litigants from using a highway department's own conclusions about a location, drawn pursuant to federal requirements, against the department in litigation concerning that location. Thus, in every reported case in which evidence was excluded under § 409, the excluded evidence made specific reference to the location that was the subject of the litigation, as the statute requires. For example, in a case cited by petitioner, *Vega v. State*, 10 Misc.3d 822, 823, 804 N.Y.S.2d 229, 231 (Ct.Cl. 2005), the court excluded "evidence concerning the DOT internal classification of the Route 302/Route 17M intersection as a 'dangerous intersection'." In *Pierce County v. Guillen*, 537 U.S. at 136, 123 S.Ct. at 725-26, the evidence at issue concerned accidents at the intersection that formed the basis of the litigation. See also *Reichert v. State*, 96-1419 (La. 5/20/97), 694 So.2d 193 (excluding correspondence concerning a proposed safety improvement project); *Palacios v. Louisiana & Delta R.R.*, 98-2932 (La. 7/2/99), 740 So.2d 95 (excluding inventory information collected about a specific location pursuant to federal statute).

The Highway Needs and Priorities manual does not mention or address any location; it merely explains what

information should be collected and the standards to which that information should be compared. As plaintiffs' expert testified, the manual has nothing to do with "any particular road or any compilation of data of highways in Louisiana." (R. 710.) The Highway Needs summary, which is prepared according to the instructions set forth in the manual, does address specific locations, but the summary was not admitted into evidence. Because the manual does not mention or address any location, it cannot be excluded in any case under the plain language of the statute.

The second reason that § 409 does not apply to Exhibit P-31 is that this document is not the kind of "report[], survey[], schedule[], list[], or data compiled or collected" that is contemplated by the statute. Those terms, while plainly broad, connote a process of acquiring and organizing information concerning locations upon which decisions concerning highway improvement projects are to be based. The statute seeks to prevent litigants from unfairly availing themselves of the work product that results from this federally mandated acquisition and organization. Again, the reported cases excluding evidence under the statute deal with the products of such a process. Thus, in *Walden v. Department of Transportation*, 27 P.3d 297, 304 (Alaska 2001), cited by the petitioner, the court excluded a "design study report" concerning the curve at issue, which the plaintiff agreed was covered by § 409. *Pierce County v. Guillen*, 537 U.S. at 136, 123 S.Ct. at 725-26, dealt with collected information concerning accident history at the location at issue.

The Highway Needs and Priorities manual precedes that process. The manual tells how to collect information and how that information should be evaluated. It is a standards document of general applicability, comparable to the standards published by AASHTO or the Manual on

Uniform Traffic Control Devices ("MUTCD"), except that it is specifically intended for the evaluation of existing roads rather than the design of new roads. The manual certainly contains "safety-related material," but that is not what § 409 excludes.

Petitioner has not cited, and respondents' counsel has not found, any reported case that excludes evidence of standards on the basis of § 409. Indeed, there seems to be little question that standards documents are unaffected by § 409. See, e.g., *Perkins v. Ohio Dep't of Transportation*, 65 Ohio App. 3d 487, 584 N.E.2d 794 (10th Dist. 1989), *cause dismissed*, 57 Ohio St. 3d 612, 566 N.E.2d 673 (1991) (discussing and excluding evidence under § 409, while also considering evidence of standards applicable under the MUTCD). The closest analogous situation was that presented to the federal district court in *Powers v. CSX Transportation*, 164 F.Supp.2d 1299 (S.D. Ala. 2001), where the court found that evidence concerning the Alabama Department of Transportation's computer system, which was used to implement federal-aid projects, was not protected by § 409. The court found that "because Section 409 protects only 'data compiled or collected' for certain purposes and not the *methods* by which data is compiled or collected, the plaintiff may conduct significant discovery concerning [the computer system] without impinging even arguably on Section 409 material." 164 F.Supp.2d at 1301. Because Exhibit P-31 is a standards document that does not contain any information required to be gathered pursuant to federal statutes, it is not within the scope of § 409.

Finally, the record is devoid of any testimonial or documentary evidence establishing the fundamental premise of petitioner's argument, that the Highway Needs

and Priorities manual and program constitute "information compiled or collected for [23 U.S.C.] § 152 purposes, and ... not ... information compiled or collected for purposes unrelated to § 152." *Pierce County v. Guillen*, 537 U.S. at 146, 123 S.Ct. at 731. Section 152 creates a Hazard Elimination Program for state and local roads. The manual does deal with highways, so there is some overlap in the program described in the manual and the highway programs referenced in § 409. But because Cornerview Road was not a federal-aid highway (R. 1132), it was not eligible for general federal funding, and neither § 130 (railroad-highway grade crossings) nor § 144 (bridges) applies. The Hazard Elimination Program of § 152 thus provides the only potential basis for rendering § 409 applicable to this document.[2] Nothing within Exhibit P-31 itself makes any reference to either the Hazard Elimination Program specifically, or any federal funding program generally. Petitioner's employee, Richard Savoie, testified that he was "familiar with the interaction between the states and the federal government as it concerns funds and funding of projects." (R. 1131.) Petitioner's counsel later asked him, "And for what purposes are they [DOTD's needs survey and minimum tolerable conditions] created and used?" Savoie responded:

> It's an evaluation of our system. It's kind of like a snapshot annually to see where we're at. It does incorporated [sic] all of the projects that have been redone. So every roadway that's been reconstructed will show up in that needs survey as meeting the tolerable conditions because they

[2] As petitioner correctly notes, § 409 was amended after the trial to change the reference to § 152 to § 148.

> would have a design speed of 60 m.p.h. or greater. (R. 1139.)

Savoie never mentioned the Hazard Elimination Program, § 152 or any other federal funding in connection with the Highway Needs and Priorities program. Neither did petitioner's retained expert when he was asked about the Highway Needs summary. (R. 1089, 1090.) Petitioner repeatedly asserts this connection (see, e.g., Petition pp. 5, 6, 10, 17, 19), but it failed to introduce any evidence to support that connection. As this Court has held, "[T]here is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152." *Pierce County v. Guillen*, 537 U.S. at 146, 123 S.Ct. at 731.

Because the Highway Needs and Priorities manual does not mention any locations, is not the type of document contemplated by § 409, and bears no relationship to any of the federal highway aid programs mentioned in the statute, the Louisiana courts properly found that the evidence was not within the purview of § 409.

3. The reasons for judgment show that the admission of the Highway Needs and Priorities manual did not determine the outcome of the case.

Even if the admission of Exhibit P-31 were erroneous, the reasons for judgment show that it did not affect the outcome of this case. The standards set forth in Exhibit P-31 are generally less stringent, and thus more favorable to the petitioner, than the design standards that constituted the bulk of the evidence. The reasons for judgment mention the Highway Needs and Priorities manual only in reference to two conditions on the highway: the design

speed and the degree of curvature. But in both cases, the trial judge found the highway defective because it violated standards that were even more lenient, and thus more favorable to the petitioner, than the minimum tolerable conditions. The judge found that the design speed was worse than not only the minimum tolerable conditions, but also the posted speed limit, which DOTD's own employee testified was improper. (Petition App. 10.) The degree of curvature was not only greater than the minimum tolerable condition of eight degrees; it was greater than the original design of ten and a half degrees. (Petition App. 9.) Given the trial judge's explicit finding that the curve was defective because it violated even the most lenient standards introduced in evidence, it cannot be said that the admission of the more restrictive standards contained in the Highway Needs and Priorities manual, even if erroneous, led to the finding of liability in this case.

4. The petition was apparently filed to delay finality of the judgment in this case.

Petitioner's accusation that the Louisiana courts "ignored" the § 409 privilege has been lodged against a state judicial system that has been a vigilant protector of that privilege. See, e.g., *Long v. State*, 2004-485 (La. 6/29/05), 916 So.2d 87; *Palacios v. Louisiana & Delta R.R.*, 1998-2932 (La. 7/2/99), 740 So.2d 95; *Reichert v. State*, 96-1419 (La. 5/20/97), 694 So.2d 193. The charge is made in a petition for certiorari that (1) fails to attach or even accurately describe the evidence of which petitioner complains; (2) ascribes an incorrect basis for the trial court's decision; (3) calls for broad and even extratextual application of a privilege statute that this Court has unanimously held must be strictly construed; and (4) contends that the

petitioner was prejudiced by the admission of certain evidence, when the judgment against it was based upon evidence that was more favorable to the petitioner than the evidence of which it complains. It appears that, for the second time in recent years, see *Wingfield v. State*, 2001-2668 (La. App. 1 Cir. 11/8/02), 835 So.2d 785, *writs denied*, 2003-0313, -0339, -0349 (La. 5/30/03), 845 So.2d 1059, 1060, *cert. denied sub nom. Louisiana v. Wingfield*, 540 U.S. 950, 124 S.Ct. 419, 157 L.Ed.2d 282 (2003), the Louisiana State Office of Risk Management has filed a petition for certiorari with the primary objective of delaying finality of a large judgment until after the adjournment of an ongoing session of the Louisiana Legislature.

La. C.C.P. article 2166(E) provides that a judgment of a Louisiana court of appeal becomes final and definitive under Louisiana law when the Louisiana Supreme Court denies an application for certiorari. Louisiana Constitution article 12, § 10(C) requires that judgments against the state be paid through legislative appropriation. The 2006 regular session of the Louisiana Legislature began on March 27, 2006, and the Louisiana Supreme Court denied petitioner's application for certiorari on April 17, 2006. The legislature appropriated funds to pay specific judgments in a supplemental appropriations bill, enacted as 2006 La. Acts No. 642; the session adjourned on June 19, 2006. By announcing its intention to petition this Court for certiorari on what was, at best, a collateral issue in this case, the Office of Risk Management effectively prevented the legislature from considering an appropriation to pay this large judgment. Given the merits of the petition, this opportunity to delay finality seems the most likely motivation for this filing.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

PAUL H. DUÉ
Counsel of Record
DONALD W. PRICE
B. SCOTT ANDREWS
DUÉ, PRICE, GUIDRY, PIEDRAHITA
& ANDREWS
(A Professional Association –
Not a Partnership)
8201 Jefferson Highway
Baton Rouge, LA 70809
Telephone: (225) 929-7481
Facsimile: (225) 924-4519

FRANK J. D'AMICO
1447 First National Bank
of Commerce Bldg.
210 Baronne Street
New Orleans, LA 70112
Telephone: (504) 588-9053

Attorneys for Respondents,
Albert Rouyea, et al.

App. 1

Highway Needs
&
Priorities

[Picture Omitted In Printing]

1983

LOUISIANA
prepared by the
DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT
OFFICE OF HIGHWAYS

* * *

CHAPTER II

GENERAL INSTRUCTIONS FOR HIGHWAY NEEDS EVALUATION

NEEDS EVALUATION CONCEPTS

Three major elements of a highway needs study are:

1. Delineation of a functional system plan described in Chapter I.

2. Identification of type and cost of capital improvements for existing and new facilities, based on their presumed (*for study cost estimating purposes only*) location on the ground. The cost of overcoming existing deficiencies (backlog needs) and correcting deficiencies developing during the 20-year study period (accruing needs) is estimated. Deficiencies are determined based on minimum tolerable conditions (below design standards).

   Once a deficiency is identified, the improvement is based on appropriate design standards for forecasted travel 20 years from the deficiency alleviation. This step will be performed annually.

3. Cost estimates for maintenance, prorated administration and stop gap programs are required to provide the total cost picture. These data are not required for developing a construction program or establishing project priorities. Consequently these data will not be estimated annually and would only be developed to fulfill the requirements of a comprehensive highway needs study.

Construction needs are divided into two broad categories: (1) new facilities (i.e. those constructed on new rights-of-way) and (2) improvements to existing facilities. These two categories have some different elements in their respective appraisal techniques.

A standard step-by-step appraisal process is more readily applied to the improvements needed on present facilities than to new facilities. For existing facilities, available information provides: (1) a geometric and physical condition inventory and (2) a comparison, element-by-element, between what exists and yardsticks of tolerability.

The broad categories of deficiency are traffic capacity, alignment, width, and structural (pavement) and drainage condition. The first three of these categories, broadly labeled "geometric", can be developed quite objectively and consistently, in the sense of being readily subject to numerically quantifiable values.

Structural and drainage adequacy require judgmental evaluation. Drainage adequacy, for example, is evaluated in terms of cross-section character (ditches, slopes, curbs, etc.) and height of grade line. These elements provide guidance, as to whether improvement is feasible or whether reconstruction is a more practical alternative. In

the determination of structural adequacy, rough-o-meter and skid resistance studies will be used to supplement engineering judgment.

The basic approach to highway needs evaluation is the minimum tolerable condition approach. Minimum tolerable conditions, the yardsticks to which existing facilities are compared, define acceptable levels for capacity, alignment, width and structural condition that are somewhat below the standards for new construction. The tolerability concept recognizes that it is not realistic to propose an improvement to a facility that provides reasonably good service, even if it is not up to the standard of a new road. The minimum tolerable conditions established for this study reflect a measure of level of service, as outlined in the 1965 *Highway Capacity Manual,* by examining operating speed, and/or, volume/capacity ratios (v/c). In addition, specific geometrics of the needs sections are evaluated in terms of their influence on safety. Minimum tolerable conditions are developed by functional class of highway and by traffic volume group within each class. Design standards for new construction are those standards established by the Department.

Appraising the adequacy of existing facilities involves two major steps, performed in sequence. First, the facility is appraised to see if it meets criteria of tolerability for present traffic. If it does not, it is classified as an existing or "backlog" deficiency. If it is now tolerable, it is appraised for its ability to meet the same tolerability criteria based on projected future traffic. If it does not, it is classified as a future deficiency. Structural deterioration of the pavement must also be considered in evaluating future deficiencies.

Type of deficiency is a key to the type of needed improvement, e.g., resurfacing, widening or reconstruction. Cost estimate will be prepared on a major cost item basis, e.g., right-of-way, surface and base, grading and drainage, etc. These will be developed on an item cost per mile basis and can be aggregated to provide an overall cost per mile value for a given section or segment of roadway. The major cost categories used in this study are right-of-way, grading and drainage, surface and base, structure, other (miscellaneous) and engineering. Costs will be based on the standard required to meet forecast year rather than present traffic.

THE NEEDS APPRAISAL PROCESS

Appraising arterial, collector and other highways requires:

1. Identifying study sections and subsections.
2. Describing existing conditions.
3. Determining the character and degree of deficiencies.
4. Estimating improvements needed to overcome deficiencies.
5. Estimating costs of needed improvements.

Step 1 – Identify Study Section

To analyze needs, the control sections will be used as logical study sections. Basically, a study section is a length of road or street that is relatively homogeneous in geometrics, traffic volume and cross sections, and long enough to be a logical section for needs appraisal.

Step 2 – Describe Existing Conditions

Determine existing conditions on each study section. To the extent possible, it is intended that this be performed as an office operation making use of inventory and condition data which are already available, and supplemented by an annual on-site inspection which recognizes and adjusts to changes from deterioration, improvements, land use, additions to or deletions from the state-maintained system, etc.

When describing existing conditions, additional breaks in the control sections may be needed. The subsection numbering scheme should be used for this purpose.

Step 3 – Determine Deficiencies

After present conditions on each section have been determined, compare them with minimum tolerable conditions to judge present and future adequacy of the section. Minimum tolerable conditions for rural arterials and collectors are given in Table 1. Minimum tolerable conditions for urban arterials are given in Table 2, and those for urban collector streets are in Table 3. (See pages 15-17.)

Initially compare each study section to the minimum tolerable condition using present traffic volumes and conditions. Identify those sections not meeting these conditions. Determine deficient sections on the basis of both structural adequacy and geometric or operational elements; or combinations of elements which do not meet these minimum tolerable conditions. Examples of conditions which place a highway in the critically deficient class are as follows:

1. Peak hour traffic volumes resulting in operating speeds lower or volume/capacity ratios higher than the minimum tolerable conditions.

2. Lane widths narrower than the minimum tolerable width specified.

3. Curves, grades, and sight distance restrictions not meeting the minimum tolerable conditions which result in unsafe conditions.

4. Pavement condition below the minimum tolerable specified.

5. Pavement type below the minimum tolerable specified.

Examine sections which presently are tolerable for their future adequacy by expanding traffic in five-year increments to the forecast year. This factor assumes compound growth. Table 4, Page 18, provides factors for estimating traffic by five-year increments using the annual traffic growth factor.

Use Table 5, Page 19, to determine the adequacy of protective devices at existing railroad crossings and the type of protection to be included in the cost estimate for those additional crossings in the forecast year. It is not necessary to indicate the year of deficiency for crossing protection. Use forecast year traffic in computing the exposure factor (ADT x number of trains).

Table 1

MINIMUM TOLERABLE CONDITIONS FOR RURAL ARTERIALS AND COLLECTORS

Functional Systems	Rural Principal Arterials		Rural Minor Arterials				Rural Collectors							
Current Average Daily Traffic	-All-		Over 6,000		6,000-1,501		1,500 or less		6,000-1,501 [1]		1,500-751		750-301		300 or less	
1. Terrain	F	R	F	R	F	R	F	R	F	R	F	R	F	R	F	R
2. Operating Speed (Peak Hour)	55	50	50	45	50	45	40	40	-	-	-	-	-	-	-	-
3. Surface Type	High [9]		High [9]		Intermediate [8]						Low [7]		Low [7]		Gravel	
4. Lane Width	11		11		11		11		11		10		9		22' Rdway	
5. Shoulder Type [6]	Stab.		Stab.		Stab.		Earth		Earth		Earth		Earth		-	-
6. Graded Right Shoulder (ft.)	8	8	8	8	6	6	6	6	4	4	4	4	2	2	-	-
7. Safe Speed (Design Speed) [2]	65	55	60	50	60	50	60	50	50	45	50	40	50	40	40	35
8. Stopping Sight Distance	550	415	475	350	475	350	475	350	350	315	350	275	350	275	-	-
9. Maximum Curvature	5°	6°	5°	8°	5°30'	8°	5°30'	8°	8°	10°	8°	13°	8°	13°	-	-
10. Maximum Gradient [3]	4°	4°	4°	4°	5°	5°	5°	5°	5°	5.5°	5°	6°	6°	6°	-	-
11. Number of Lanes	[4]		[4]		2		2		2 [1]		2		2		-	-
12. Pavt. Cond.(PSR or Equiv.) [10]	2.6		2.6		2.1		2.1		2.1		2.1		2.1		-	-
13. Railroad Crossing Protection	Refer to Table 5															
14. Structures:																
a. Width (ft.) [5]	Approach Pavement								Approach Pavement							
	+6ft.		+4 ft.		+4 ft.		+4 ft.		+2 ft.		+2 ft.		20'	20'	18'	18'
b. Vertical Clearance (ft.)	14		14		14		14		14		14		14		14	
c. Loading	H-20		H-20		H-15		H-15		H-15		H-15		H-15		H-15	

[1] Rural Collectors with present ADT above 6,000 should be multilane where necessary to maintain peak hour operating speeds of 40 and 35 in flat and rolling terrain respectively.

[2] Approximate speed on which minimum tolerable stopping sight distance, curvature, and gradients are based.

[3] Steeper grades may be considered tolerable if lengths are relatively short or climbing lanes are provided.

[4] As necessary to maintain the operating speed specified.

[5] For bridges over 250 ft. in length, widths 4 ft. less than shown, but in no case less than the width of the approach traveled way, will be considered tolerable.

[6] Stabilized indicates Gravel or other granular material, with or without admixture.

[7] Bituminous Surface Treatment.

[8] Bituminous Concrete, with a combined - surface and base - thickness less than 7 inches.

[9] Bituminous Concrete, Portland Cement Concrete, or brick, with a combined - surf. & Base - thickness over 7 inches.

[10] Value of 2.6 or 2.1 indicates appropriate table (B-1 thru B-4) for EALA comparison.